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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-542

PRINCE WILLIAM HOSPITAL CORPORATION,

Petitioner,

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Prince William Hospital Corporation, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on September 24, 1974.

1. Opinion Below

The Opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 1a-15a),[1] is not reported as yet, was entered on September 24, 1974 and this Petition for certiorari was filed within fifty days of that date.

2. Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

3. Questions Presented

1. Whether the term "equal work" within the meaning of the Equal Pay Act of 1973, herein referred to as the Act, means "equal work" or "substantially identical work" as the legislative history clearly sets forth, or whether it means "comparable work" or something less than "equal work" as contended by the Secretary of Labor.

2. Assuming *arguendo*, that "equal work" means "substantially equal work" or something less than "substantially identical work":

(a) Whether a female nurses aide who lifts a patient in a hospital with the assistance of two or more persons is performing "equal work", within the meaning of the Act, with a male orderly who lifts a patient with the assistance of only one person.

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[1] Pet. App. followed by a number with a small "a" refers to the Appendix to this petition. J.A. refers to the Joint Appendix before the Fourth Circuit. Br. App. refers to the Appendix to Appellee-Hospital's Brief before the Fourth Circuit. CCH Labor Cases are cited herein as 65 LC 32, 497, for example, and CCH wage and hour cases as 65 WH 32, 497.

(b) Whether a female nurses aide, who is assisting a male orderly in lifting a heavy patient in a hospital, supports one arm and leg of the patient, while the male orderly does the major portion of the lifting and is primarily involved in lifting and maneuvering the patients other arm and leg in addition to the patient's trunk, is performing "equal work" within the meaning of the Act.

(c) Whether a female nurses aide who performs a task only in an emergency, or at most once or twice a year in a hospital is performing "equal work", within the meaning of the Act, with a male orderly, who performs the same task 2 or 3 times a week on a regular basis.

(d) Whether a female nurses aide, who is not trained to do catheterizations, a vital and important special procedure in the health care of a male patient consuming approximately 40 minutes of work time for each procedure, is performing "equal work" under the Act with a male orderly, who is trained to do catheterizations, and does one catheterization a day, or 4 or 5 each week, on male patients.

3. Whether the District Court applied the proper test under the Act and assessed the proper burden of proof against the Secretary under the Act.

(a) Whether, even though the District Court applied the wrong test under the Act, the District Court's decision should be reversed since there is substantial evidence in the record to sustain it but not substantial evidence in the record to support the findings and conclusion in the decision of the Court of Appeals.

(b) Whether the Court of Appeals invaded the province of the Trial Court under Rule 52 or otherwise and should have remanded the case to the District Court for further findings in accordance with guidelines of the Court of Appeals.

4. Statutory Provisions Involved

The equal pay provisions (commonly referred to as the Equal Pay Act) were added to the Fair Labor Standards Act in 1963 by P.L. 88-38 (77 Stat. 56). Congress added several subsections to Section 6 of the Fair Labor Standards Act, two of which (Sections 6(d)(1) and 6(d)(3), 29 U.S.C., Secs. 206(d)(1) and 6(d)(3)) are involved here:

> "Sec. 6(d)(1). No employer having employees subject to any provisions of this section *shall discriminate*, within any establishment in which such employees are employed, *between employees on the basis of sex by paying wages to employees* in such establishment *at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs*, the performance of which requires *equal skill, effort, and responsibility, and which are performed under similar working conditions*, except where such payment is made pursuant to (i) *a seniority system;* (ii) *a merit system;* (iii) *a system which measures earnings by quantity or quality of production;* or (iv) *a differential based on any other factor other than sex;******".

> Sec. 6(d)(3). For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid overtime compensation under this Act."

5. Statement of the Case

The Secretary of Labor brought this action in the United States District Court for the Eastern District of Virginia under the Act to enjoin the Prince William Hospital from allegedly violating the Act's equal pay provision by paying male orderlies more than its female nurses aides for the performance of work which it contended was "equal" within the meaning of Section 6(d) of the Act. The Secretary also sought damages for the period January 10, 1970 to January 10, 1972 for the wage differential allegedly due the female aides.

Prince William Hospital, a Virginia Corporation, is engaged in operating a general hospital in Manassas, Virginia, the County Seat of Prince William County. The hospital, which has 154 beds, is a two-story, cross-shaped building of four medical-surgical patient units, an obstetrics floor, an intensive care unit, a cardiac care unit, four major and one minor operating rooms, an emergency room and a nursery. Its average occupancy is 120 patients, 60 percent of whom are women.

As of January, 1972, Defendant employed 7 full-time orderlies and 34 full-time aides. At the same time, Defendant had three part-time orderlies and three part-time aides. Two full-time orderlies are assigned to the operating room and a third is assigned to the emergency room. These are not involved in this litigation. Accordingly, the ratio

of orderlies to aides involved in the case is approximately 1 to 7. This case is limited to the floor orderlies and floor aides who are assigned to specific areas in the hospital and take care of an assigned number of patients. Floor orderlies "float" to other areas of the hospital as their services are demanded. Aides do not "float."

Following the trial, the District Court (Lewis, D.J.) concluded that the jobs of male orderlies and female aides were not substantially equal and dismissed the Complaint. In his eight page opinion, Judge Lewis found that the following duties were performed by male orderlies that were not performed by female aides:

1. Lifting and positioning of heavy patients
2. Catheterizations of male patients
3. Surgical preps involving the genitalia
4. Restraining combative, hysterical or other persons
5. Obtaining and setting up orthopedic equipment
6. Providing security by pressure and actions to patients and other personnel
7. Assisting in the Emergency Room.

The Court also found that due to a lack of male orderlies, nurses aides working in pairs and/or nurses performed the heavy work when orderlies were unavailable. When assistance was needed in the Emergency room, the orderly was called in to assist the Physician, nurse or other orderly while the female aide was called in to answer the telephone and handle the clerical work.

In addition, the Court found that male catheterizations and male preps involving male patients were handled by Physicians and/or registered nurses when orderlies were

not available. The Court then found – on the basis of the Department's own Exhibit A – that although both aides and orderlies did generally the same type of patient care, the amount of work that each performed was different. The Court then cited the following examples from the Department's Exhibit A. Three aides and three orderlies performed the following tasks:

1. Three aides gave 33 baths compared to 19 for orderlies,
2. Made 125 beds compared to 58 for orderlies,
3. Cleaned 14 incontinent patients to 42 for orderlies,
4. Gave or emptied 26 urinals to 47 for orderlies,
5. Moved patient with assistance 17 to 7 for orderlies,
6. Assisted the Registered Nurse with treatment 23 to 47 for orderlies,
7. Discharged patients, 23 to 7,
8. Post Mortem, 0 to 8,
9. Minor treatment, 2 to 12,
10. Obtained supplies 0 to 2,
11. Performed messenger duties, 57 to 77,
12. Assisted with visitor control, 1 to 4.

Other parts of the Department's Exhibit A more than support the Court's findings as set forth below.

The evidence in the record overwhelmingly supports the decision of the District Court. The Court of Appeals considered none of this evidence.

1. *Catheterization.* Time studies show that it takes 25 to 30 minutes to catheterize a male patient. In addition to the 25 minutes, 15 additional minutes are consumed in assembling the equipment for the procedure and putting it away afterward (P. Ex. 18, J.A. 173).

The Director and the Assistant Director of Nurses both testified, without contradiction, that catheterization of males takes 30 to 40 minutes. They also testified that on some days 2 to 3 catheterizations were performed and on other days 5 to 6 would be done. Over half of these would be on women and slightly less than half on men (J.A. 134, 148-150).

Department's Exhibit A shows that 3 orderlies catheterized 8 patients in a 10-day period. The Hospital's Exhibit 15 shows that orderlies catheterized 12 patients in a 21-day period (J.A. 188). Nurses aides do not catheterize patients – not even female patients (J.A. 48, 58).

2. *Special Preps.* Until October 1971, the floor orderlies did all of the surgical preps. Even during the 3-week period in January of 1972, 19 surgical preps were still performed by the floor orderlies (P. Ex. 15), J.A. 188). One orderly testified that in a 3-month period in 1970, he would average at least 3/4 to 1-1/2 surgical preps a shift and that it was not unusual for him to do 2 a shift and he had done as many as 5 in one shift. A surgical prep would take him 30 minutes. (J.A. 136, 141).

Time studies show that 3 surgical preps performed by orderlies took 29, 42 and 81 minutes each respectively. This was in addition to the 3 to 5 minutes orientation time required. The average surgical prep on a male takes 54 to 56 minutes. Exhibit 15 shows that the orderlies performed 19 surgical preps in a 22-day period. At an average of 55 minutes each, over 40 minutes each day was spent by orderlies in doing surgical preps. (P. Ex. 18, BR. App. 172).

Nurses aides do not normally do surgical preps. If not done by the prep team, surgical preps on females are done by Registered or licensed nurses. Time studies show that female preps done by nurses or technicians consumed an average, with orientation time, of 44 to 47 minutes. Aide Sandra Coleman testified that she had once preped a patient for a Caesarean. Pauline Herder who works in the Labor and Delivery room testified that she had occasionally done surgical preps. These situations are unusual.

3. *Emergency Room Detail.* The Director of Nurses testified that orderlies floated to the Emergency room. The Assistant Director of Nurses testified that nurses aides were called there to answer telephone calls, make out records, take TPR's and other similar duties. Exhibit A shows that in a 10-day period in May 1972, 3 aides were called to the Emergency room 10 times as against 3 orderlies being called there 16 times. (BR. App. 21).

The chart of Aide Geraldine Hall (91) shows she was in the Emergency room for one shift on May 7, 1972. During that time she registered 6 patients, made up 11 stretchers and prepared 2 lab slips. Aide Virginia Kenney (Chart 99) made up 5 stretchers in the Emergency room. Aide Nina Rose (Chart 50) returned a stretcher to the Emergency room between 5 and 6 o'clock on May 4, 1972. (P. Ex. 7 not printed in J.A.).

In contrast, the orderlies were called to the Emergency room to assist the Registered nurse or Physician in special procedures, not for routine tasks. During a 3-week period in January 1972 orderlies were called to the Emergency room some 14 times. Orderly Brown went there 3 times in one day, January 6, to explain a Vasectomy preparation

to an outpatient and one on the next day to check the same procedure. On January 8, he went there again to assist a Physician in holding a body cast while the Physician set it. After the patient was in his room, Brown returned the cutter to the Emergency room. (D. Ex. 4). On January 8, Orderly Backman went to Emergency room to give patient care for 45 minutes. On January 9, Orderly Hinkle went to Emergency room to clean off a patient's head and leg so that he could be sewn up. During this period, Orderly Connelly went to the Emergency room once to assist in an emergency and another time to pick up and transport a new admission. (D. Ex. 4)

4. *Floating.* Floor orderlies are required to "float," *i.e.*, to make rounds of the entire hospital and to go where needed. Nurses aides do not float. An orderly floats in addition to taking care of his assigned number of patients. If an orderly "in floating" has to perform some special procedure that involved one to two hours, the charge nurses would assign a registered or licensed nurse or a nurses aide to take over his patients temporarily. (J.A. 48, 71-72).

Exhibit A shows that 3 orderlies handled 28 assigned and 10 unassigned patients for a total of 38 patients. In contrast 3 female aides handled 26 assigned and 5 unassigned patients for a total of 31 patients. (BR. App. 21, 23).

5. *Setting up Traction.* Male orderlies normally obtain heavy traction equipment and set it up unassisted. Orderly Long, a pre-med student, testified that it took 10 minutes to obtain the equipment and thereafter 15 to 20

minutes to set up heavy traction and 5 minutes to set up light traction. (J.A. 141-143). Government Witness Mary Lou Lillicoth stated that if an orderly were not present it would take an additional person or two to set up traction. (J.A. 14).

6. *Post-Mortem.* Orderlies take expired patients to the morgue with the assistance of the supervising nurse. An aide on occasion accompanies the orderly or registered or licensed nurse who is taking the body to the morgue. During a 10-day period, 3 orderlies handled 8 post-mortem cases while 3 aides handled none. (BR. App. 21-23).

7. *Oxygen Tanks and Tents.* Until January 25, 1971 during (one-half the crucial period) male orderlies transported oxygen tanks and set up oxygen tents. During this period the hospital had only 60 beds but had a 120 percent occupancy and were using oxygen tanks and tents in the halls, treatment rooms and conference rooms, wherever they could put beds for patients. (J.A. 27-28).

8. *Heavy Moving, Transportating Equipment and Supplies and Lifting Patients.* The Director of Nurses testified that orderlies did a "heavier type moving and transporting, lifting and positioning of patients." The orderly would lift a patient by himself. On occasion he might be assisted by a nurse or a female aide. If a heavy helpless patient had to be moved, the orderly would be on one side of the bed and would do the major part of the lifting, whereas the female aide would support the patient on the other side and take care of the arm or leg, whereas the male orderly would primarily be involved in maneuvering the trunk of the patient. If an orderly is moving a helpless

patient, and an aide or nurse is assisting him on the other side, the orderly doing the pulling has the biggest load. The person on the other side of the bed is only supporting and guiding. (J.A. 52-55).

If a draw sheet were used, the orderly again would be pulling the patient which is the biggest load. If an orderly is not around to restrain a combative patient, normally the security guard would be called. If neither were available, it would be the responsibility of the professional registered nurse to protect the patient. (J.A. 55, 58-60).

Exhibit 15 shows that in a 21-day period the orderlies lifted 21 heavy patients. During the same period, the orderlies took care of three combative patients. Taking care of a combative patient is a far cry from placing wrist or other restraints on a patient to keep him from falling out of bed. (J.A. 188).

REASONS FOR GRANTING THE WRIT

Introduction

The principal provisions of the Equal Pay Act have never been construed by this Court.[2] The Act is now in its 11th year of operation, and now for the first time, there is a clear conflict between the decision in the *Golden Isles* case, 468 F.2d 1256 (5th Cir. 1972) in the Fifth Circuit and the *Prince William Hospital* case, *supra*, in the Fourth Circuit.

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[2] This Court considers a very tiny question involving the Act in *Corning Glass Works v. Brennan*, 42 U.S. LW 4827 (June 3, 1974), namely, whether the night shift came with the term "working conditions." In that case, the Chief Justice, Justices Blackmun and Rhenquish dissented and Mr. Justice Potter took no part in the consideration or decision of the case.

In each of the cases in the Court of Appeals, and in Memoranda in Opposition to Certiorari in this Court, the Department of Labor has mistated to this Court, the various Courts of Appeal as well as many of the U.S. District Courts a clearly erroneous view of the unique legislative history of the Equal Pay Act. Because of the nature of the Act, this erroneous view has permeated almost all of the court decisions interpreting the Act.

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF THE EQUAL PAY ACT.

(a) The decision below is in direct conflict with the leading case in the health care field in the Fifth Circuit in *Hodgson v. Golden Isles Nursing Home, Inc., supra.**

The facts in these two cases are very similar. Although the Golden Isles facility had a capacity of 200 beds, it never took more than 105 patients and its average occupancy ranged between 78 and 84 patients, most of whom were women. It employed 33 to 34 female aides and 3 to 4 male orderlies, although during several months only one full-time orderly was employed.

The Prince William Hospital had 154 beds in 1972, its average occupancy was never over 120 patients, 60 percent of whom were women. In January of 1972, it employed 34 full-time and three part-time female aides and seven full-time and three part-time male orderlies. The case is limited to the floor orderlies; the two operating and one emergency room orderly are excluded.

The District Courts in *Golden Isles* and *Prince William* found the following duties were performed by male orderlies that were not performed by the female aides:

	Golden Isles		*Prince William*
1.	Catheterization "a skilled nursing function"	1.	Catheterization
2.	Total Lifting	2.	Lifting and positioning of heavy patients
3.	Irrigation	3.	(No finding of irrigation)
4.	Setting up traction	4.	Obtaining and setting up orthopedic equipment
5.	Returning patients – acting as drivers	5.	Restraining combative patients
6.	Primarily setting up oxygen tanks – requiring skill and knowledge	6.	(No finding on oxygen-evidence that until 1/25/71 orderlies set up oxygen tanks and tents)

7. *Floating.* The District Court in *Golden Isles* stated "In addition to performing the above different functions, the orderlies at Golden Isles were required to Float in the rest of the nursing home. Aides were not required to 'float.' This was a substantial difference." Orderlies (but not aides) were required to "float" at Prince William Hospital.

The *Golden Isles* case, *supra,* relies on the legislative history of the Act as reviewed extensively and considered in *Hodgson v. William and Mary Nursing Hotel,* 65 LC 32,

543 (M.D. Fla. 1970) which the Court of Appeals below repudiated.

A comparison of the conclusions of law in the *Golden Isles* case, *supra*, with the *Prince William* case, *supra*, illustrates the conflicts between the two circuits.

Golden Isles Case	
1. It is not merely skill and responsibility that Congress sought to address, *but a substantial identity of job functions.*	1. The response to this dilemma has been to require the Secretary to prove *substantial equality* of skill, effort and responsibility as the jobs are performed.
2. Furthermore, Congress intended to permit employers a *wide discretion in evaluating work for pay purposes.* In the House Subcommittee Report on the Equal Pay Act, 109 Cong. Rec. 9209-9210 (1963) examples were debated to illustrate that wage differentials can be justified for employees *who are available to perform an important differentiating task even though they do not spend large amounts of time at the task.*	2. If courts defer to over nice distinctions in job content, employers may evade the Act at will. Court of Appeals reverse because allegedly orderlies did not spend large amounts of time performing catheterizations, surgical preps, floating, lifting, post-mortem – record evidence to the contrary.
3. "We do not decide here whether the job of orderly should be open to females or whether the job of nurses aide should be open to males."	3. *"Qualified female employees are not given the opportunity to do the extra work."* "It sometimes takes more than one aide, or mechanical assistance, to replace one orderly, *but there is no evidence that any heavy lifting cannot be done without male assistance."*
4. "Those questions are to be resolved under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Sec. 2000e (1970), in the manner pursued in *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971)." Refuses to follow *Shultz v. Wheaton Glass*, 421 F.2d 259 (3rd Cir. 1969).	4. The Court of Appeals follows the legislative history of *Shultz v. Wheaton Glass Co., supra*, which cites and follows the legislative history of Title VII of the Civil Rights Act and other bills never adopted by Congress rather than that of Equal Pay Act.
5. "Courts must be cautious not to apply improperly one Congressional Act to achieve a purpose for which another Act was intended." Refuses to follow *Shultz v. Wheaton Glass, supra.*	5. Same as 4 above. Follows *Shultz v. Wheaton Glass Co., supra*, which holds that the Equal Pay Act must be construed *in pari materia* with the Civil Rights Act.
6. "In addition to performing these different functions, the orderly was required to 'float' to help in the rest of the nursing home. Aides were not required to 'float.' *This was a substantial difference.*"	6. "Floating itself adds nothing to the level of skill or responsibility for that depends on work done in other locations." (Court then states that orderly did not have to perform their extra duties in addition -- all record evidence contrary to Court of Appeals. See page 10 of this petition).

7. "We decide only that the evidence supports the findings that the work done by the orderly at Golden Isles was sufficiently different from the work done by the aide to justify different pay scales. *Having decided that, the extent of the difference is of no concern in this proceeding.*"	7. "The orderly's job therefore *does* call for the exercise of skill and responsibility which is not required of the aides *** when no floor orderly is present, other qualified male personnel are available to do them [catheterization]. However, no more than one or two are usually performed each week." (Record evidence shows 2 or 3 or sometimes 4 or 5 performed each day – half on women).
8. Court of Appeals relies on *Hodgson v. William and Mary Nursing Hotel*, 65 LC 32, 543 (M.D. Fla. 1970); *Hodgson v. Good Shephard Hospital*, 327 F. Supp. 143 (E.D. Tex. 1971); and *Shultz v. Royal Glades, Inc., supra.* The Department of Labor appealed the *William and Mary* and the *Good Shephard* cases, *supra*, to the Fifth Circuit. However, after its time expired to file its brief, it withdrew its appeal in each case, respectively.	8. Does not rely on and attempts to distinguish these cases (except makes no reference to *Royal Glades* case, *supra*).
9. Court of Appeals limits and distinguishes, *First Brookhaven Hospital* case, *supra*, *Hodgson v. Hubbard Hospital*, 66WH 248 (W.D. Tenn 1971).	9. Relies on *First Brookhaven Hospital* case, *supra*, (except does not mention *Hodgson v. Hubbard Hospital, supra*).
10. Court of Appeals does not rely on: *Shultz v. Wheaton Glass, supra; Hodgson v Miller Brewing Co.*, 475 F.2d 1041 (5th in 1973); *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041 (5th in 1973) cases not involving health care facilities and distinguishes this type of case.	10. Relies on all these cases, not involving health care facilities. It should be noted that *Hodgson v. Behrens Drug Co.*, was a Fifth Circuit case.
11. Fifth Circuit stated in *Golden Isles* case, *supra*, "The Department of Labor apparently seeks to obtain a conclusive determination by the Courts that, in hospitals and nursing homes across the county, aides and orderlies perform equal work." That Court made a similar statement and refused the Department such a *per se* rule, as well, in the *Second Brookhaven* case, 470 F.2d 729, 730 (5th in 1972) when it said (17 days after its decision in the *Golden Isles* case), "***contrary to the Secretary's aspiration toward a *per se* rule the developing law of remunerative equally***."	11. The Fourth Circuit has fulfilled the Department's aspiration and granted it such a *per se* rule. The Courts hold that even though (1) it takes 2 or 3 female aides to lift a patient that 1 male orderly could lift, (2) a male orderly performs a special task *1 time a day* or *4 or 5 times a week*, and a female aide performs the same task *1 or 2 times a year*, (3) a male orderly "floats" in addition to his regular work, and assists the nurse in the treatment of a patient in the emergency room, while a female aide is called there and assists in the emergency room answering telephones, registering patients or filling out forms, *the work is equal*. This is the perse Rule that the Fourth Circuit adopted – and the Fifth Circuit rejected.
12. Three Prong Test of the Equal Effort Doctrine adopted in *First Brookhaven* case, *supra*, severely limited in *Golden Isles* case. See 2, 3, 4, 5 and 7 above.	12. Three Prong Test is extended. See 2, 3, 4, 5 and 7 above.

(b) The issue of whether "equal work" within the meaning of the Equal Pay Act means "substantially identical work" or "equal work" as the legislative history unmistakably shows or whether it means "substantially equal work" or "comparable work" or something less as the Secretary has persuaded the Fourth Circuit in the case at bar and the other Circuits to accept a misinterpretation of the Equal Pay Act by citing the legislative history of other equal pay act bills that never became law.

Review by this Court is essential to the correct and orderly administration of the Act in accordance with the clear intention of Congress.

The Court below erred in holding that the legislative history required it to conclude that the extra duties of male orderlies over female aides in (1) lifting and positioning heavy patients, (2) catheterizing male patients, (3) surgical preps involving the genitaiia, (4) transportation of oxygen tanks and tents, (5) restraining combative, hysterical or other patients, (6) obtaining and setting up orthopedic equipment, and (7) assisting with special medical procedues in the emergency room constituted "comparable or substantially equal" work and hence not justify, in some instances, a wage differential of 10 to 15 cents an hour.

It is plain that the Fourth Circuit was persuaded to this doubtful and harsh result – contrary to a lengthy and unusually clear statement of legislative intent by Congress – because the Court accepted the Department's incorrect interpretation of the legislative history of the Equal Pay Act by citing Congressional statements made in connection with other bills before the Congress which were rejected and defeated (Appellants Reply Brief, pp. 16-19, citing hearings on H.R. 3861 and Related Bills, 88th Cong., 1st Sess., 1963, p. 240).

Legislative History – The Most Unique Ever

The legislative history of the Equal Pay Act is without doubt the most unique of any act ever adopted by Congress.

(1) The House of Representative in lengthy debate specifically precluded the Secretary from issuing interpretative regulations and Congress wrote the regulations.

(2) The House of Representatives rejected the Senate-passed Bill (H.R. 6060) and *specifically rejected the Senate interpretation of the language used and the Senate Report* and said so (by the Managers of the Bill) in clear and concise language.

(3) Most of the dozen members of the House, who had introduced Equal Pay Act bills in the past thought the House-passed bill too limited or conservative and voted for it expressing the hope that the Senate would make it a broader and more liberal bill. The Senate never did. It accepted the House-passed bill.

(4) The House of Representatives adopted an unusually strict measure of proof of the Secretary in these cases, and rejected the Senate interpretation in so many words and illustrations.

(5) The Senate tabled its earlier passed bill, and accepted the completely different House-passed version, without any debate on the differing versions and with cursory comments of three Senators.

The sequence of events in this unique legislative history is as follows: On May 17, 1963 the United States Senate passed S. 1409, its version of an equal pay law. Almost a week later, on May 23, 1963, the House of Representatives debated S. 1409 as well as its own very different

version, H.R. 6060. The House struck out everything after the enacting clause and wrote an entirely different bill.

On May 23, 1963, on the advice of its Majority and Minority leadership that there would be no Equal Pay Act that year unless it did, the Senate scrapped the Bill which it had already passed (S. 1409) and adopted in toto the House-passed Bill (H.R. 6060 as amended) without any real debate and with very little comment except to the fact that the Senate was capitulating to the House.

Since the House Bill as further amended was adopted, and the Senate-passed Bill summarily rejected by first the House and then the Senate, the Senate debate is significant, not in interpreting the House version which it does not do, but in showing complete capitulation, which it does do.

The protracted and lengthy debate in the House on the interpretation of the Bill by the Managers of the House-passed Bill is of utmost and prime consideration. The remarks cited and quoted herein in the Appendix are from Congressmen Goodell (R-N.Y.), Griffin (R-Mich.), Freylinghuysen (R-N.J.) and Thompson (D-N.J.), the Managers of the Bill on the floor of the House.

This Court held in *Schwegmann Bros. v. Calvert Distilling Corp.*, 341 U.S. 384, 394-5 (1951) in construing the legislative history of the Miller-Tydings Act that the remarks by the managers or sponsors of a bill in the floor debate should be given great weight in the interpretation of the statute. Of course, the interest of Congress overweighs the predilections of the Secretary or any court precedent where he has prevailed through a misreading of the statute.[3]

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[3] That case could not be more in point.

(continued)

In *United States v. United Mine Workers*, 330 U.S. 258, 279-280 (1947), this Court relied on the statements of Congressmen Michener and LaGuardia in construing provisions of the Norris-LaGuardia Act because

> "Representatives Michener and LaGuardia were members of the Judiciary Committee which reported and recommended the bill to the House. They were the most active spokesmen for the committee, both in explaining the bill and advocating its passage. No member of the House who voted for the bill challenged their explanation. *** We cannot but believe that the House accepted their authorative representations as to the proper construction of the bill."

Even though 60 days previously the Court of Appeals had denied the Department additional time to file a reply brief, the Department filed a 19-page reply brief with appendicies with the Court two days before the hearing and on Counsel for the Hospital a day before the hearing.

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[3] (continued)

"First, the House Report, while referring to a typical state Fair Trade Act" is so drafted that another principle is involved in the core of the argument.

"In the second place, the remarks relied on were not only about a bill on which no vote was taken; they were about an entirely different bill.

"We look for more definite clues; and we find the following statement made on the floor by Senator Tydings***." "The fears and doubts of the opposition are no authoritative guide to the construction of Legislative History. It is the sponsors that we look to when the meaning of statutory words is in doubt." This is what the Court did in *Hodgson v. William and Mary Nursing Hotel, supra*, the only decision in which the legislative history of the Equal Pay Act has been considered in detail, and the decision on which *Hodgson v. Golden Isles Nursing Home*, 468 F.2d 1256, *supra*, relies.

Even though this brief totally misrepresents the legislative history of the Act, the Department persuaded the Court of Appeals in accepting its version.

On page 18 of its Reply Brief, the Department makes a gross misrepresentation[4] after arguing that a gratuitous statement by Senator McNamara in Senate is the true legislative history and that Congressman Goodell's statement, along with the other floor managers of the bill, Congressman Griffin and Congressman Thompson, should be ignored.

Congressman Goodell was the sponsor of the bill that passed the House, he was the principal floor manager. The other three managers were Congressmen Frelinghuysen, Griffin and Thompson. Rep. Goodell was a member of the House Labor Committee. Senator McNamara did not sponsor H.R. 6060. H.R. 6060 was tabled in the House. He sponsored S. 4609 which passed the Senate and was rejected *in toto* by the House and then by the Senate. His remarks on amended H.R. 6060 when it was substituted for the Senate Bill are not part of its legislative history. In capitulating to the House-passed Bill,

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[4] "In contrast to Senator McNamara, Congressman Goodell, on whose statements defendant relies, *was not sponsor of H.R. 6060, nor was he a member of the House Subcommittee which drafted that bill*" (Hearings before the House Labor Subcommittee on H.R. 3681 and Related Bills, 88th Congress, 1st Sess., 1963, p. ii) although he did offer two of the twenty equal pay bills that were introduced during the first Session of the Eightieth Congress (H.R. 5110 and H.R. 5606). *His remarks, therefore, are not entitled to any special weight, and, to the extent that they suggest a 'substantially identical standard,' they are inconsistent with the statement in the House Report that the bills equal work standard is based on 'factors' which are found in the majority of the job classification systems.*"

Senator McNamara was making a political speech. Senator Dirksen made it clear that the prospective conferees in the House and Senate on the Minority side to whom he talked preferred the House-passed bill. Senator McNamara did not wish to take the House and Senate versions to a Conference Committee for fear there would be no bill adopted as was the case in 1962. Nothing could be clearer to anyone that can read and write. See Appendix D hereto (pp. 27a-37a) for the legislative history in detail.

As this Court cogently stated, *Schwegmann Bros. v. Calvert Distilling Co.*, 341 U.S. 394 (1959), *supra*, in construing the Miller-Tyding Act,

> "The remarks relied on were not about a bill on which a vote was taken; they were entirely different bills." [This is true of Senator McNamara's remarks]
>
> "The fears, doubts of the opposition are no authoritative guide to the construction of legislative history." [Senator McNamara opposed the House-passed Bill which the Senate ultimately adopted].
>
> "It is the sponsors that we look to when the meaning of statutory words is in doubt." [Congressmen Goodell, Griffin, Frelinghuysen and Thompson and no one else].

The Department further misled the Court of Appeals by stating[5] "In any event, as is clear from the legislative excerpts reproduced in Appendix B, *infra*, S. 1409 which passed the Senate and H.R. 6060 which was substituted

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[5] Page 17 of its Reply Brief below.

by the House and accepted by the Senate, are almost identical." Nothing could be further from the truth.[6] The two bills were poles apart.

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[6] As Judge Willson succinctly stated in the *William and Mary Case*, 65 LC 32,497, 20 WH 10 (E.D. Fla. 197)

> "Legislative intent may be shown in many ways. Normally it is shown best by the Reports of Committees of Congress, and debate on a particular bill engaged in by the Managers of the bill if the same exists on the particular issue or issues in controversy. *Such exists here in unusual detail.* For these and other reasons stated herein, *the debate in the House of Representatives is very significant.*
>
> "Many of the members, and particularly Congresswomen Green (D.-Ore.), Dwyer (R.-N.J.) and Sullivan had sponsored equal pay legislation over the years. xxx All of the legislators supported the House Bill (H.R. 6060 [as amended] even though it was a far weaker proposal than their bills because as they stated, they wanted some bill enacted in 1963. Congresswoman Dwyer pleaded for its adoption without further weakening amendments. Congresswoman Kelly stated that H.R. 6060 was only a start, and Congresswoman Sullivan said the bill was all right as far as it went but it did not go far enough.
>
> "Congressman Dent (D.-Pa.) stated H.R. 6060 fell short of doing the job. He stated that he would vote for it, even though it did not accomplish its true purpose as he hoped, the Senate would substitute the word "comparable" for "equal." *The issue in the debate in the House of Representatives is clear cut and unambiguous. xxx.*
>
> "Since the Senate capitulated and accepted the House version, the debate in the Senate on May 17, 1963 on S. 1409 *is of almost no value in showing legislative interest except to the extent that it shows what the Congress rejected."* (Citing 109 Cong. Rec., Part 7, 88th Congress, 1st Session, pages 9200-9202, 9205, May 23, 1963)

II. THE DECISION BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

Except for the recent decision in *Brennan v. Corning Glass Co.*, 42 U.S.L.W. (June 3, 1974), construing a limited question of "working conditions," this Court has not construed or interpreted the provisions of the Equal Pay Act. The Department of Labor has been successful in having its misinterpretation of the legislative history of the Act adopted by several Courts of Appeal, among them *Shultz v. Wheaton Glass Co.*, 421 F2d 259 (1970), cert. den. 398 U.S. 905 (1970) by the Third Circuit, in *Hodgson v. Square D Co.*, 459 F2d 805, cert. den. 409 U.S. 967 (1969)[7] by the Sixth Circuit, and *Shultz v. American Can Co.*, 424 F2d 356 (1970) by the Eighth Circuit, and *First Victoria National Bank*, 420 F2d 648 (1969) by the Fifth Circuit, in addition to the case at bar.

However, the Fifth Circuit later repudiated its holding in *First Victoria Bank, supra, sub silento* by its decisions in the *First Brookhaven case, supra*,[8] and *Golden Isles case, supra.* In the *First Victoria Bank* case, the Department of Labor in its brief did not cite the statements of Congressmen Goodell, Griffin and Thompson as legislative history. Instead it persuaded the Court that the

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[7] Mr. Justice Douglas would have granted certiorari in that case.

[8] The Fifth Circuit, in next to the last paragraph of its opinion plainly stated "The purposes of the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are not well served by confounding the respective proofs required of plaintiffs * * * we reject that approach [of the Third Circuit] because we believe it is destined to yield unfair results.

true, legislative history was found in (1) Statement of President Kennedy in signing the Act, (2) Secretary Wirtz's testimony before the Senate Labor Committee on a different bill that was never enacted, (3) the Senate Subcommittee Report on the bill that the House struck out and the Senate later repudiated and (4) a statement of Congressman Pucinski on a totally different bill debated in the House of Representatives the year before and repudiated by the House in 1963.

However, the damage was done and the Court of Appeals for the Third Circuit cited and followed the *First Victoria Bank Case, supra,* and adopted this so-called legislative history in *Shultz v. Wheaton Glass Co., supra,* and the Eighth Circuit adopted it in *Shultz v. American Can, supra.*

In the case at bar, the Department relied heavily on the legislative history as set forth in *Shultz v. Wheaton Glass Co., supra,* and persuaded the Fourth Circuit to adopt its distorted reading of such legislative intent. When certiorari was sought in the *Wheaton Glass Case* in 1970, there was no conflict between the Courts of Appeal as there is now. The *Golden Isles case, supra,* was not decided until 1972. Even though it lost, and even though that decision conflicted with the *Wheaton Glass case, supra,* the *American Can case, supra,* as well as the *Square D case, supra,* the Department did not seek certiorari in the *Golden Isles Case, supra,* as apparently it believed it could not win. For the first time a Court of Appeals had found the true legislative history of the Equal Pay Act and the Department wanted no part of it.

The Appellee called the Department in its brief (on page 29) on its representations in these three cases from different circuits, *First Victoria, Wheaton Glass* and *American Can cases, supra:* the Department did not repeat this

in its reply brief. However, it then conjured up a new misrepresentation of legislative history by using a speech of Senator McNamara who opposed the House-passed bill and who had to lead the Senate into capitulating to the House or have no bill.

To date, the Department has forced countless settlements with hospital and nursing homes throughout the country by misrepresentation. Some 18 uncontested cases or settlements are reported in labor law services.[9] Almost all of these cases are settlements obtained by misrepresenting the legislative history of the Act.

In the health care field, the Department has lost nine outstanding cases.[10]

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[9] Settled Cases: *Hodgson v. St. Elizabeth Hospital*, 70 LC 32,863, 20 WH 1242 (Ed Ky. 1973); *Hodgson v. Skyvue Terrace, Inc.*, 68 LC 32,699, 20 WH 754 (WD Pa. 1972); *Hodgson v. Oil City Hospital*, 70 LC 32,826, 20 WH 1094 (WD Pa. 1972); *Hodgson v. Lancaster Osteopathic Hospital Ass'n, Inc.*, 66 LC 32,543 (ED Pa. 1971); *Hodgson v. McMurray Hills Manor, Inc.*, 66 CCH LC 32,589, 20 WH 324 (WD Pa. 1971); *Hodgson v. South Shore Convacare, Inc.*, 67 LC 32,628, 20 WH 490 (ND Ill. 1972); *Hodgson v. Stastny*, 67 LC 32,654 (MD Ill. 1972); *Hodgson v. Arden Memorial Convalescent Hospital, Inc.*, 68 LC 32,657 (ED Calif. 1972); *Hodgson v. Arizona Foundation*, 69 LC 32,756 (D. Ariz. 1972); *Hodgson v. City of Ashland*, 70 LC 32,817 (D. Ore. 1972); *Hodgson v. Beverly Enterprises*, 67 LC 32,694, 20 WH 677 (ED Calif. 1972); *Hodgson v. Cheviot Hills Convalarium*, 67 LC 32,638, 4EPD 7699 (CD Calif. 1972); *Hodgson v. Garden Hospital*, 69 LC 32,757 (ND Calif. 1972); and *Brennan v. St. Luke Hospital*, 72 LC 32,969, 21 WH 392 (ED Ky. 1973).

[10] Cases Lost By The Secretary: *Brennan v. Cenco Hospital & Convalescent Homes Corp.*, 71 LC 32,908, 21 WH 29 (SD Tex. 1973); *Hodgson v. Good Shepherd Hospital*, 327 F.Supp. 143 (ED Tex. 1971); *Shultz v. Royal Glades, Inc.*, 66 LC 32,548, 67 LC

(continued)

Unless the provisions of the Equal Pay Act are determined by this Court, confusion will still run rampant in the Courts of Appeal as well as the District Courts. In the latest case, after the *Prince William decision, supra,* for example, *Hodgson v. Kuakini Hospital,* 73 L.C. 33,014 (D. Hawaii, November 5, 1973), the Chief District Judge held that the Secretary

> "has not proven that the primary job functions performed by defendants' aides and orderlies are *substantially identical.* A comparison of jobs involving job functions *which are not substantially identical is outside the purview of the Equal Pay Act, Hogdson v. Golden Isles,* 468 F2d 1256 (5th in 1972)."

The Chief Judge correctly interpreted the *Golden Isles case, supra.* The Fourth Circuit in the case at bar did not.

III. THE DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT IT SHOULD BE REVIEWED

The decision of the Court of Appeals below reversing the District Court is based on the grounds that the District Court applied the wrong standard because it gave

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[10] (continued)
32,633 (SD Fla. 1971); *Hodgson v. William & Mary Nursing Hotel,* 65 LC 32,497, 20 WH 10 (MD Fla. 1971); *Shultz v. Kentucky Baptist Hospital,* 62 LC 32,296, 19 WH 403 (WD Ky. 1969); *Hodgson v. Golden Isles Nursing Home, Inc.,* 468 F2d 1256 (5th Cir. 1972) case below 64 LC 32,445; *Hodgson v. Owensboro-Daviess County Hospital,* 21 WH 250 (WD Ky. 1972), pending on appeal, (6th Cir.) No. 73-1261; *Hodgson v. Ancolote Manor Foundation,* 72 LC 32,957, 21 WH 290 (MD Fla. 1973); *Hodgson v. Kuakini Hospital,* 73 LC 32,014 (D. Haw. 1974).

"undue significance to these differences because it misapprehended the statutory definition of equal work which embraces the concepts of 'skill, effort and responsibility.'" The Court of Appeals reversed and remanded for entry of judgment for the Secretary, ignoring entirely the evidence in the record which supported the decision of the District Court. This is a violation of Federal Rules of Civil Procedure, Rule 52(a).

As the Fourth Circuit stated in the *Golden Isles case*, 458 F2d 1256, to prevail on appeal the Secretary of Labor must show that (1) the district court's findings are clearly erroneous and (2) the evidence compels a finding of fact that the work was equal. That court then stated "The Secretary would have us ascribe our own weight to the factual differences that appear in the evidence, but weighing and evaluating the facts is properly the task of the trial court (25a)."

The Fourth Circuit in the case at bar is doing exactly this. However, it did not even weigh the evidence in the record. Instead it relied upon the Department's Reply Brief, alluded to above, for statements of evidence which are clearly erroneous and inaccurate. The Department misrepresented to the Court the record evidence as will appear below. The evidence related below is related in more detail under the Statement of Case in this petition at pages 7 to 12. Commencing on page 6(a) of the the opinion of the Fourth Circuit the following findings of the Court are quoted and answered:

> 1. "All nurses aides are in Grade I in which the hourly pay ranges from $1.98 to $2.31, and all orderlies are in Grade II, in which the hourly pay ranges from $2.08 to $2.43 * * * (6a)."

Evidence: This is not accurate. For example, orderlies Samuel Lewis and Daniel Miller were hired at $1.75 an hour and William Connelly and Joseph Kacsandi at $1.80 an hour. Female aides Lola Fulton, Virginia Kenney and Elizabeth Jewell, among many others were hired at $2.06 an hour.

2. "The hospital emphasizes statistical evidence which shows that aides and orderlies do not perform all of their routine tasks with equal frequency. One of its exhibits for example shows that aides write charts, make beds, give baths, rub backs and fetch bedpans more often than orderlies. Orderlies, on the other hand, bring supplies, run errands and assist the nurses with their duties more often than aides. These distinctions, however, do not show any difference in skill, effort or responsibility (8a)."

Evidence: This is in error. Hospital's Exhibit 26 does show the difference in skill, effort and responsibility. The Court of Appeals describes approximately one-fourth of the exhibit and ignores the three-fourths which supports the decision of the District Court. The exhibit is reprinted in full in Appendix E to this petition (38a-41a). The exhibit was made up from 30 activity sheets or charts of male orderlies and 364 activity sheets of female aides and was used by the Department in preparing its Exhibit A relied on by the District Court. It shows the following frequency with which orderlies and aides perform various tasks:

	Orderlies	Aides
I. Off Floor Duties	3.494	2.560
II. More Skilled duties	5.361	2.772
III. Clerical Tasks	9.764	21.126
IV. More Simple Tasks	46.856	75.779

3. Floating "might add to the degree of effort involved if the orderlies, in addition, had to perform their full basic workload. This, however, is not the case. According to the director of nursing, an orderly's routine duties at his assigned station are reassigned to other staff personnel, including the aides, when he is in another part of the hospital (10a)."

Evidence: This is incorrect. The Director of Nurses testified that the orderlies floated in addition to handling a similar number of patients. When asked by a Department lawyer what would happen if an orderly were gone on one task for one to two hours, she responded that the Supervising Nurse would reassign the patients to a Registered or Licensed Nurse or to an aide (J.A. 48, 71-72). The government's Exhibit A showed that 3 male orderlies took care of 28 assigned and 10 unassigned patients for a total of 38 patients in addition to "floating". In contrast 3 female aides handled 26 assigned and 5 unassigned patients for a total of 31 patients (BR. App. 21, 23).

4. "The performance of tasks involving physical strength, therefore, though necessary to the operation of the hospital, is not a peculiar aspect of the orderlies' job. (10a-11a)"

Evidence: This is not accurate. The Court went on to say that

"Strength is not a factor in the hiring of orderlies, except in the very general sense that the hospital assumes that a man usually is stronger than a woman. A large, burly woman would not be hired as an orderly, nor would a small delicate man be hired as an aide. But the converse is not true. *One of the orderlies is 5'2" tall and weighs 125 lbs., while one aide is 6'1" and weighs 225 lbs.* The wage differential therefore cannot be justified on the grounds that the hospital is maintaining a reserve of strong men for essential tasks (11a)."

Evidence: This is clearly erroneous. The 5'2" tall orderly who only weighs 125 lbs. is Warren Rector, *the clean-up orderly in the Operating Room, who is not involved in this proceeding.*

5. "The emergency room is staffed by an orderly whose status is not questioned in this action. The hospital's claim that floor orderlies "assisted" there is supported only by the job description, but a mere job description without evidence of actual performance does not establish the existence of extra duties. * * * Aides were also called to work in the emergency room. The record proves no more than that both aides and orderlies performed their normal duties with minor variations in a different location (11a)."

Evidence: This is clearly erroneous. The Assistant Director of Nurses, testified without contradiction, that female aides were called to the emergency room to answer telephone calls, make out records and other similar duties. Depart-

ment's Exhibit 7 shows that aide Geraldine Hall was in the emergency room for one shift on May 7, 1972. During that time she registered 6 patients, made up 11 stretchers and prepared 2 lab slips (Chart 91). Aide Virginia Kenney (Chart 99) made up 5 stretchers in the emergency room. Aide Nina Rose (Chart 50) returned a stretcher to the emergency room between 5 and 6 o'clock on May 4, 1972 (Pl. Ex. 7).

In contrast, theorderlies were called to the emergency room to assist the Registered nurse or the Physician in special procedures and not for routine tasks. For example, during a 3-week period in January 1972 orderlies were called to the emergency room some 14 times. Orderly Bachman went to the emergency room to care for a patient on January 8. Orderly Hinkle went to clean off a patient's injured leg and head so that it could be sown up. Orderly Brown went there 3 times in one day, January 6, to teach a Vasectomy procedure to an outpatient and one on the next day to check another patient. On January 8, he went there to assist a Physician in holding a body cast while the Physician set it. This is from an exhibit which the Department quotes extensively in its Brief at pages 13-14. (D. Ex. 4) There are countless other illustrations, yet the Department misled the Court of Appeals into this error.

6. "Although in theory the orderly deals with disturbances, in practice the nearest staff member is expected to do so until assistance

comes. Aides are expected to restrain violent or disoriented patients themselves when possible. They also deal with intruders. The hospital's tabulation of orderly and aide activity shows aides spending a larger proportion of their time than orderlies in applying restraining devices to patients. There is no evidence that orderlies do more actual physical restraint than aides (12a)."

Evidence: This is erroneous. It is also a misinterpretation of the evidence fostered in the Department's Brief. There are several types of restraints. The Director of Nurses testified about canvas and leather restraints used on patients in bed who are confused. Aides would normally apply these. Aides are not expected to deal with violent or disoriented patients (J.A. 66).

7(a). "However, no more than one or two routine catheterizations are usually performed each week. When no floor orderly is present other qualified male personnel are available to do them."

Evidence: This is in error. The Director of Nurses, and the Assistant Director, testified without contradiction that one some days 2 to 3 catheterizations were performed and on others 4 to 5 were performed. Half of these would be women. Department's own Exhibit A shows 3 orderlies catheterized 8 patients in 10 days. This is certainly many more than 1 or 2 each week (J.A. 134, 148-150). When an orderly is not present – the

only qualified "male personnel" the Court speaks of is a Physician.

7(b) "The hospital looks for no special skill in this regard from its prospective orderlies, but concedes that 'any reasonably dextrous person can learn male catheterization on the job.' (14a)"

Evidence: Neither is this statement accurate. The quotation is taken out of context from the following testimony of the Director of Nurses (J.A. 75):

"Q. What is the reason that an aide is not allowed to do that [catheterization]?

"A. I just answered that; by nature of background and education. I mean, it's not that she cannot perform the technical skill, which I can teach to you. But I would have to go into depth about infection control, anatomy and physiology, so that she has a broad concept of what she is doing. As a technical skill –

"Q. You mean the dexterity, the handling?

"A. The dexterity, the handling of the equipment itself and the mechanics of inserting a catheter.

"Q. Any reasonably dexterous person could do that?

"A. *Can be trained to do this.* But when you are talking about an RN or an LPN who has come through training and knows the difference between what we call a clean field and a duty field, a sterile

or unsterile field, there has to be a certain amount of integrity in this * * *."

7(c) "Orderlies were assigned this duty only when the hospital decided that a higher wage rate was needed to attract men for routine care work, and new orderlies who have not yet learned to catheterize are nevertheless paid at the higher rate (14a)."

Evidence: This is directly contrary to the evidence in the record. The testimony of the Administrator of the Hospital was that orderlies were upgraded "to meet the nurses requirements; * * * they wanted someone to be able to catheterize. * * * This was due to a new Director of Nurses * * * because she felt she wanted this position upgraded to the point that we would give better patient care (J.A. 18-20)."

These examples are only a sampling of the erroneous findings based solely on the Department's Reply Brief. It is clear from a comparison of the Findings by the Court of Appeals and the evidence in the record that the decision of the Court of Appeals is not supported by the evidence. Having found that the District Court applied the wrong standard, the Court of Appeals should have remanded the case to the District Court for it to make findings in accordance with guidelines laid down in its opinion. This was the proper procedure rather than invade the province of the District Court. *Hodgson v. Brookhaven General Hospital,* 436 F2d 719, on remand aff'd 470 F2d 729 (5th Cir. 1972).

CONCLUSION

Wherefore, Your Petitioner prays that this Honorable Court will exercise its jurisdiction in this case and grant the writ (1) to resolve a conflict between the Courts of Appeal (2) to determine the proper interpretation of the Equal Pay Act and (3) to correct the procedure of the Court of Appeals in its invasion of the province of the District Court.

Respectfully submitted,

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November, 1974

CERTIFICATE AS TO SERVICE

I certify that copies of this brief were mailed this 5th day of November, 1974, to William J. Kilberg, Esquire, Solicitor of Labor, and Donald S. Shire, Esquire, U.S. Department of Labor, Washington, D.C. 20210.

/s/ John K. Pickens
John K. Pickens

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 73-2331

Peter J. Brennan, Secretary of Labor, United States Department of Labor,

Appellant,

versus

Prince William Hospital Corporation,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued May 8, 1974 Decided September 24, 1974

Before BOREMAN, Senior Circuit Judge, CRAVEN and BUTZNER, Circuit Judges.

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BUTZNER, Circuit Judge:

The Secretary of Labor appeals from the dismissal of an action against Prince William Hospital to equalize pay of male hospital orderlies and female nurses' aides in con-

formity with the Equal Pay Act of 1963, 29 U.S.C. § 206 (d)(1).[1] The district court noted that the facts were not in dispute and that the controversy centered on the inferences to be drawn from them. It found that although aides and orderlies do the same type of patient care work, the following differences exist between the jobs: the proportions of routine care tasks are not the same; aides do work which orderlies are neither required nor permitted to do; and, most important, orderlies do work, including extra tasks, which aides are neither required nor permitted to do. In concluded, therefore, that the Secretary had failed to establish that the aides and orderlies perform substantially equal work.

We believe that the district court gave undue significance to these differences because it misapprehended the statutory definition of equal work, which embraces the concepts of "skill, effort, and responsibility."[2] Since it applied an improper legal standard to the relevant facts, we reverse and remand for the entry of judgment for

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[1] 29 U.S.C. § 206(d) provides:

> "No employers having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ."

[2] 39 U.S.C. § 206(d)(1). Congress patterned the Equal Pay Act on the principles of job classification by which many employers set wage rates. Under these principles each job is rated in terms of the skill, effort, and responsibility required to do it, and the working conditions of the place where it is performed. *See* Corning Glass Works v. Brennan, 42 U.S.L.W. 4827, 4830 (U.S. June 3, 1974).

the Secretary. *See* Piedmont Minerals Co. v. United States, 429 F.2d 560, 562 n. 4 (4th Cir. 1970); Shultz v. Wheaton Glass Co., 421 F.2d 259, 267 (3d Cir. 1969); 9 Wright & Miller, Federal Practice and Procedure § 2589 (1971).

I

In applying the Congressional mandate of equal pay for equal work on jobs which require equal skill, effort, responsibility, there are two extremes of interpretation that must be avoided. Congress realized that the majority of job differentiations are made for genuine economic reasons unrelated to sex. It did not authorize the Secretary or the courts to engage in wholesale reevaluation of any employer's pay structure in order to enforce their own conceptions of economic worth. *See* Hodgson v. Miller Brewing Co., 457 F.2d 221, 227 (7th Cir. 1972). But if courts defer to overly nice distinctions in job content, employers may evade the Act at will. Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1049 (5th Cir. 1973); Hodgson v. Miller Brewing Co., 457 F.2d 221, 227 (7th Cir. 1972); Hodgson v. Fairmont Supply Co., 454 F.2d 490, 493 (4th Cir. 1972); Shultz v. American Can Co.–Dixie Products, 424 F.2d 356, 360 (8th Cir. 1970); Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1969). The response to this dilemma has been to require the Secretary to prove substantial equality of skill, effort, and responsibility as the jobs are actually performed. *See* Hodgson v. Fairmont Supply Co., 454 F.2d 490, 493 (4th Cir. 1971); Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970).

One of the most common grounds for justifying different wages is the assertion that male employees perform extra tasks. These may support a wage differential if they create significant variations in skill, effort, and responsibil-

ity between otherwise equal jobs, *see, e.g.* Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256 (5th Cir. 1973). But the semblance of a valid job classification system may not be allowed to mask the existence of wage discrimination based on sex. The Secretary may therefore show that the greater pay received by the male employees is not related to any extra tasks and thus is not justified by them. Higher pay is not related to extra duties when one or more of the following circumstances exists:

¶ Some male employees receive higher pay without doing the extra work. *E.g.* Shultz v. American Can Co.–Dixie Products, 424 F.2d 356 (8th Cir. 1970); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970).

¶ Female employees also perform extra duties of equal skill, effort, and responsibility. *E.g.*, Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1971)

¶ Qualified female employees are not given the opportunity to do the extra work. *E.g.* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1969).

¶ The supposed extra duties do not in fact exist. *E.g.* Hodgson v. Security National Bank, 460 F.2d 57 (8th Cir. 1972).

¶ The extra task consumes a minimal amount of time and is of peripheral importance. *E.g.* Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973); Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972); Shultz v. American Co.–Dixie Products, 424 F.2d 357 (8th Cir. 1970).

¶ Third persons who do the extra task as their primary job are paid less than the male employees in question. *E.g.* Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1969).

In all of these cases the basic jobs were substantially equal. Despite claims to the contrary, the extra tasks were found to be makeweights. This left sex – which in this context refers to the availability of women at lower wages than men – as the one discernible reason for the wage differential. That, however, is precisely the criterion for setting wages that the Act prohibits. *See* Brennan v. City Stores, Inc., 479 F.2d 235, 241 n. 12 (5th Cir. 1973); Hodgson v. Brookhaven Hospital, 436 F.2d 719, 726 (5th Cir. 1970).

II

Although a number of courts have applied the Equal Pay Act to hospital and nursing home aides and orderlies, varied employment practices among institutions have prevented the development of an industry-wide standard. The Act must be applied on a case by case basis to factual situations that are, for practical purposes, unique. *See* Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256, 1258 (5th Cir. 1972). It is therefore necessary to examine in some detail the employment practices of Prince William Hospital, even though the material facts are not in dispute.

Prince William is a 154 bed general hospital in Manassas, Virginia. It contains four medical and surgical units, intensive care and cardiac facilities, an obstetric floor with a nursery, four operating rooms, and an emergency room. Average occupancy is 120 patients, 60% female.

Floor orderlies and nurse's aides provide routine patient care under the supervision of nurses. The hospital hires only men as orderlies and only women as aides. Their numbers varied during the time covered by this case, ranging between 30-40 aides and 5-10 orderlies.[3] When the case was tried, there were four full-time orderlies and thirty-four full-time aides, plus three part-time orderlies and three part-time aides. Full-time employees work five eight-hour shifts per week.

The hospital has maintained a pay differential between the two jobs since 1969.[4] It uses a pay system with thirteen pay grades and five steps within each grade. Grades are assigned to positions and steps within grade show merit or longevity. All nurses aides are in grade I, in which the hourly pay ranges from $1.98 to $2.31, and all orderlies are in grade II, in which the hourly pay ranges from $2.08 to $2.43, depending on the step in which the employee has been placed.

Before 1969 aides and orderlies had been paid the same wages, but the hospital had difficulty in hiring orderlies. The hospital's administrator believed that a higher wage was needed to attract orderlies because of the limited number of men willing to do housekeeping and personal care work. When the orderlies' wages was raised, they were given the additional duty of catheterizing male patients.

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[3] This figure includes two orderlies permanently assigned to the operating rooms and one assigned to the emergency room. Since they are not involved in routine patient care, the case does not concern them.

[4] The parties have stipulated that the hospital is covered by § 206(d) and that $23,445.23 in back wages are payable if it violated the Act.

Hiring criteria for aides and orderlies are identical, a tenth grade education, personal cleanliness, and a desire to work with people. Experience, though desirable, is unnecessary. Although the educational level of the aides is somewhat lower, both groups included individuals who had not finished high school. The pay differential follows neither experience nor education. An aide with prior hospital experience starts in grade I step 2 ($2.06), while a completely inexperienced orderly starts in Grade II step 1 ($2.08).

Aides and orderlies are the least skilled persons who care for patients. They participate in a common orientation program, but much of their training is acquired on the job. Each is assigned six to eight patients who require routine care. Whenever possible orderlies are assigned to male patients and aides to female, but the shortage of orderlies requires aides to care for males. Most of the time, aides and orderlies are occupied with tasks related to routine patient care that do not require the skills of a trained nurse.

The principal duties of both, which the hospital's director of nursing stated were identical, can be divided into four groups; patient care, which includes oral hygiene back rubs, baths, bed-making, answering calls, giving bed pans, feeding, transporting the patient, and assistance with ambulation; minor treatment, which includes weighing, taking pulse, temperature, or blood pressure, draping and positioning the patient, administering heat pads and ice packs, assistance with dressing changes, and giving enemas; housekeeping, which includes room cleaning, equipment care and cleaning, work area cleaning, obtaining supplies; and miscellaneous tasks, including answering the phone, running errands, and transportation to the morgue.

The hospital emphasizes statistical evidence which shows that aides and orderlies do not perform all of their routine tasks with equal frequency. One of its exhibits, for example, shows that aides write charts, make beds, give baths, rub backs and fetch bed pans more often than orderlies. Orderlies, on the other hand, bring supplies, run errands and assist the nurses with their duties more often than aides. These distinctions, however, do not show any difference in skill, effort or responsibility. All of the routine tasks are relatively simple. None performed more frequently by the orderlies requires the exertion of significantly more skill, effort, or responsibility than those performed more frequently by the aides. As hired, trained, and employed, the orderlies and aides are practical substitutes for one another in the performance of their basic duties. Disproportionate frequency in the performance of the same routine tasks does not make the job unequal. *See* 29 C.F.R. § 800.123 (1973).[5]

III

The district court also found that aides perform certain duties which orderlies do not. Specifically, it found that some of the aides work in the obstetric department and care for infants in the nursery. Orderlies were not assigned to obstetrics according to the director of nursing, for two reasons: there were no male patients and their lifting ability was unneeded there. Aides assigned to obstetrics performed the same duties as those on the medical and surgical wards.

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[5] While 29 U.S.C. § 206(d) does not give the Secretary of Labor authority to promulgate binding regulations, his interpretation of the statute is entitled to great deference when it does not contradict the intent of Congress. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1970).

These facts do not show any differences in skill, effort, or responsibility. Unless there is a difference of working conditions involved, which is not contended here, there is no reason why the performance of the same duties in a different location should be a significant difference in the jobs. *See* 29 C.F.R. § 800.123 (1973); Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972).

IV

The final – and in some respects the most difficult – aspect of this case pertains to extra duties throughout the hospital that are assigned to the orderlies but not to the aides. These duties are specified in the job description of the orderlies. The district court found that the following extra duties were the most significant: heavy lifting, assisting in the emergency room, performing surgical preps on male patients, providing physical security by dealing with combative or hysterical persons, and catheterization of male patients.

Job descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling. *See* 29 C.F.R. § 800.121 (1973); Hodgson v. Brookhaven General Hospital, 436 F.2d 719, 724 (5th Cir. 1970). This aspect of the case, therefore, turns primarily on the extent to which the aides and orderlies actually perform the extra duties nominally assigned to the orderlies and on the skill, effort and responsibility involved in those tasks which the orderlies alone perform.

In addition to caring for assigned patients, orderlies are required to answer calls to different parts of the hospital. On these excursions, called floating, they perform either their basic duties or the extra tasks. Floating itself adds nothing to the level of skill or responsibil-

ity, for that depends on the work done in the other locations. It might add to the degree of effort involved if the orderlies, in addition, had to perform their full basic workload. This, however, is not the case. According to the director of nursing, an orderly's routine duties at his assigned station are reassigned to other staff personnel, including the aides, when he is in another part of the hospital.[6]

The job description states that orderlies are expected to perform total lifting of heavy or helpless patients and to set up traction equipment. The district court, however, found that the same tasks are performed by aides when no orderly is available and that aides assist orderlies in these tasks. Due to the small number of orderlies, there are rarely more than two on duty each shift, and from time to time no orderly is available on some of the shifts. It sometimes takes more than one aide, or mechanical assistance, to replace an orderly, but there is no evidence that any heavy lifting cannot be done without male assistance.[7] The performance of tasks involving

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[6] In contrast, Hodgson v. Good Shepherd Hospital, 327 F. Supp. 143, 146 (E.D. Tex. 1971), on which the hospital relies, involved orderlies without assigned patients. The court characterized their work as "continuous, demanding, and tiring. . . . so rushed as to prevent rest or scheduled coffee breaks or lunch periods," which was not true of the aides' job.

[7] The reverse was true in Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256 (5th Cir. 1972); Hodgson v. Good Shephard Hospital, 327 F.Supp 143 (E.D. Tex. 1971); and Hodgson v. William and Mary Nursing Hotel, 20 W.H. Cases 10 (M.D. Fla. 1972), in all of which orderlies were required to transport and set up heavy, bulky oxygen equipment which was unsafe or impossible for the aides to move. In addition, the aides in *William and Mary* were forbidden to move patients by themselves. 20 W.H. Cases at 23.

physical strength, therefore, though necessary to the operation of the hospital, is not a peculiar aspect of the orderlies' job. Strength is not a factor in the hiring of orderlies, except in the very general sense that the hospital assumes that a man usually is stronger than a woman. A large, burly woman would not be hired as an orderly, nor would a small delicate man be hired as an aide. But the converse is not true. One of the orderlies is 5'2" tall and weighs 125 lbs., while one aide is 6'1" and weighs 225 lbs. The wage differential therefore can not be justified on the grounds that the hospital is maintaining a reserve of strong men for essential tasks.

Heavy lifting does not add significantly to the effort involved in the orderlies' job. In the ten working days covered by the hospital's survey of activities, the orderlies set up traction only once and lifted or assisted patients of unknown weight 54 times. Aides set up traction and lifted or ambulated patients a proportionate number of times. The extra effort, if any, is not substantial.

The emergency room is staffed by an orderly whose status is not questioned in this action. The hospital's claim that floor orderlies "assisted" there is supported only by the job description, but a mere job description without evidence of actual performance does not establish the existence of extra duties. Hodgson v. Brookhaven General Hospital, 436 F.2d 719, 724 (5th Cir. 1970). Aides were also called to work in the emergency room. The record proves no more than that both aides and orderlies performed their normal duties with minor variations in a different location.

All surgical preps during the day shifts are done by the operating room staff. On the evening and night shifts, surgical preps on men are done by orderlies, and

on women by aides or nurses. Aides also do surgical preps in the obstetric ward. A person performing a prep explains to the patient what is about to be done, shaves the area where the incision will be made, and washes it with antiseptic soap. The skill, effort, and responsibility involved are identical regardless of the patient's sex.

Physical security, as an extra duty, has two components. Because of his size and sex, the presence of a male orderly is claimed to reassure the other staff and exert a calming and deterrent effect on potentially violent patients or intruders. Because of his superior strength, he is given the primary responsibility for restraining actually violent persons. According to the hospital, he therefore posseses a special skill and is required to exert extra effort.

The hospital's contention, however, is contradicted by the record. Although in theory the orderly deals with disturbances, in practice the nearest staff member is expected to do so until assistance comes. Aides are expected to restrain violent or disoriented patients themselves when possible. They also deal with intruders. The hospital's tabulation of orderly and aide activity shows aides spending a larger proportion of their time than orderlies in applying restraining devices to patients. There is no evidence that orderlies do more actual physical restraint than aides.

No doubt the physical presence of a man in the house does have a comforting effect on the staff. It is doubtful, though, that this is a significant component of the orderly job. Unlike hospitals in which providing physical security has been found significant,[8] Prince William Hospital does

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[8] *E.g.* Hodgson v. Owensboro-Daviess County Hospital, 21 W.H. Cases 250 (W.D. Ky. 1972) (primary care of violent patients, alco-

(continued)

not handle psychiatric, alcoholic, criminal, or other potentially dangerous patients. There is no evidence that episodes caused by violent or confused patients are so frequent or dangerous that orderlies are necessary for the safety of the staff. Security guards are called to deal with violent episodes even when orderlies are available. Moreover, the ability to deal with confused or violent patients, according to the director of nursing, is as much a function of attitude and experience as of size and strength. If the orderly's superior strength is an extra skill, it is a peripheral part of his employment.

The hospital places great emphasis on the fact that orderlies insert Foley catheters in male patients. It contends that the task is a highly skilled and responsible procedure, requiring 30 to 45 minutes of an orderly's time.

A Foley catheter is a sterile tube which is inserted in the patient's urethra to drain the bladder. Orderlies catheterize male patients with unobstructed urinary tracts. If any difficulty is forseen or experienced a physician catheterizes the patient. Nurses catheterize female patients. They are competent to catheterize males, but prefer not to do so for reasons of modesty. Since the hospital has enough nurses to catheterize women, aides are not assigned this duty. The orderly's job therefore does call for the exercise of skill and responsibility which is not required of the aides.

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[8] (continued)
holics, and addicts); Hodgson v. Good Shephard Hospital, 327 F. Supp. 143 (E.D. Tex. 1971) (violent alcoholics, addicts, and psychiatric patients in lockup cells); Hodgson v. William and Mary Nursing Hotel, 20 W.H. Cases 10 (M.D. Fla. 1971) (geriatric facility with many senile patients).

However, no more than one or two routine catheterizations are usually performed each week. When no floor orderly is present, other qualified male personnel are available to do them. The hospital looks for no special skill in this regard from its prospective orderlies, but concedes that "any reasonably dextrous person can learn male catheterization on the job." Orderlies were assigned this duty only when the hospital decided that a higher wage rate was needed to attract men for routine care work, and new orderlies who have not yet learned to catheterize are nevertheless paid at the higher rate.

Like any other extra duty, catheterization must be evaluated as part of the entire job. In Hodgson v. Fairmont Supply Co., 454 F.2d 490, 496 (4th Cir. 1972), we pointed out that when jobs were substantially equal, a minimal amount of extra skill, effort, or responsibility cannot justify wage differentials. Infrequent performance of catheterizations, unaccompanied by other extra skills and responsibilities, has never been held to support a pay differential between aides and orderlies. The orderlies in Hodgson v. William an Mary Nursing Hotel, 20 W.H. Cases 10 (M.D. Fla. 1971), for example, a case in which the district court found catheterization to be a significant extra duty, also moved heavy equipment, administered suction therapy, and did other demanding work not done by aides. Catheterizations, moreover, were frequent and difficult in that geriatric nursing home. Similarly, catheterization was only one element of the orderlies' duties, which differed fundamentally from the aides in Hodgson v. Good Shephard Hospital, 327 F.Supp 143 (E.D. Tex. 1971). In contrast, catheterization which only consumed a minimal amount of time was considered to be an insubstantial difference in Shultz v. Brookhaven General Hospital, 305 F.Supp. 424 (E.D. Tex. 1969), *aff'd in part and*

remanded in part sub nom Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (5th Cir. 1970), *on remand* 20 W.H. Cases 54 (E.D. Tex. 1971), *aff'd* 470 F.2d 729 (5th Cir. 1972). We conclude, therefore, that orderlies' pay differential can not be justified on the basis of the occasional extra work involved in catheterizing male patients.

In sum, the work performed by aides and orderlies is not identical. But, as we have previously held, application of the Equal Pay Act is not restricted to identical work. Hodgson v. Fairmont Supply Co., *supra*, 454 F.2d at 493. The basic routine tasks of the aides and orderlies are equal. The variations that the district court found, when tested by the Act's standard of "equal skill, effort, and responsibility," do not affect the substantial equality of their overall work.

The judgment of the district court is reversed, and this case is remanded for entry of judgment for the Secretary.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JAMES D. HODGSON, Secretary of Labor, etc.,	:	
Plaintiff	:	
v.	:	Civil Action No. 10-72-A
PRINCE WILLIAM HOSPITAL CORPORATION,	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

This is another in the series of cases brought by the Secretary of Labor under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., to compel hospitals to pay their nurses aides the same wages paid orderlies.

The Government contends that the work of the nurses aides and the orderlies at the Prince William Hospital is practically identical, consisting almost exclusively of routine patient care. The Secretary is suing for an injunction under § 17 of the Act to restrain the Hospital from continuing violations of the equal pay section and from witholding back wages found to be due the defendant's employees as a result of those violations. The Hospital denies the charges.

The naked facts are not in dispute – only the inferences to be drawn therefrom.

The record here made discloses that all nurses aides at the Prince William Hospital are female – All orderlies are male. The differential in pay is ten cents per hour.

The hospital job description for nurses aides and orderlies does not mention sex – Both work day, evening and/or night tours of forty hours per week – Both report to the head nurse or her designate.

Education and experience requirements are the same – Both have the same patient care duties and responsibilities except that the orderlies are usually assigned male patients – Orderlies, however, do not care for infants and children – This work is performed by the nurses aides.

Nurses Aides are assigned to the patient division and provide the maximum patient care services within the limits of the delegated tasks – Orderlies are assigned to all hospital areas and are immediately available under the direction of the day, evening and/or night supervisor for any hospital area where the orderlies' presence and/or actions provide security to patients, personnel and/or other pesons for which a nurses aide is not capable.

Specifically, orderlies are available for immediate assistance in

(1) Lifting and positioning heavy or helpless patients.

(2) Assisting patients who need a great deal of physical support in walking (e.g., CVAs with paralysis, amputees or orthopedic patients with casts).

(3) Catheterization of male patients.

(4) Surgical preps of males involving genitalia or perineum.

(5) Restraining combative or hysterical patients or other persons.

(6) Obtaining orthopedic carts in setting up orthopedic equipment.

(7) Providing security by presence and/or actions to patients and/or personnel for which a nursing aide is not capable.

(8) Assisting in the emergency room as needed.

The live evidence discloses that both the aides and the orderlies performed the duties called for in their job descriptions.

The Hospital had many more aides than orderlies – 35 nurses aides and 5 orderlies on a shift. Orderlies were hard to get.

Due to the lack of orderlies, nurses aides working in pairs and/or nurses sometimes performed the heavy work usually performed by the orderlies - When assistance was needed in the emergency room and no orderly was available, the nurses aide relieved the person or persons in the emergency room that was handling the telephone or doing the clerical work so that that person or persons could assist in the emergency room – Male catheterization and male surgical preps involving the genitalia or perineum were performed by doctors and/or registered nurses when orderlies were not available.

In addition, at the request of the Court, the Hospital kept an accurate record of the duties performed by three nurses aides and three orderlies from April 30th to May 14th – A close examination of this report discloses that although both the aides and the orderlies did generally the same type of patient care work, the amount of work that each did in each category is not the same.

For example –

The three aides gave 33 baths to 19 for the orderlies;

Made 125 beds for 58 for the orderlies;

Cleaned 14 incontinent patients to 42 for the orderlies;

Gave or emptied urinals, 26 to 57;

Moved patients to stretcher or to bed with assistance, 17 to 7;

Assisted the registered nurses with treatment, 23 to 47;

Discharged patients, 23 to 7;

Post-mortem, 0 to 8;

Minor treatment (TED hose, ice packs, etc., 2 to 12;

Obtained supplies, 28 to 56;

Returned supplies, 0 to 2;

Performed messenger services, 56 to 77;

Assisted with visitor control, 1 to 4.

Although equal work under the Fair Labor Standards Act means substantially equal, this Court is satisfied from the records here made that aides and orderlies at the Prince William Hospital do not perform substantially equal work. Orderlies are required to do many things that aides are neither required nor permitted to do, namely – heavy lifting – patient and personnel security – assist in the emergency room – and perform certain functions in connection with male patients.

Aides are likewise required to perform many duties that orderlies are neither required nor permitted to do, namely – OB room work and caring for infants and children.

Although the duties differ somewhat from hospital to hospital, it is worth noting that all courts, with the possible exception of the Northern District of Texas, that have been called upon to determine whether the work of

aides and orderlies is substantially equal have reached the same conclusion here reached. See Hodgson v. Brookhaven Hospital, 436 F.2d 719 (5th Cir. 1970); Hodgson v. William & Mary Nursing Hotel, 65 Lab. Cas. 32,497 (M.D. Fla. 1971); Hodgson v. Good Shepherd Hospital, 62 Lab. Cas. 32,500 (E.D. Tex. 1971); Hodgson v. George W. Hubbard Hospital, 66 Lab. Cas. 32,572 (M.D. Tenn. 1971); Hodgson v. Golden Isles Nursing Home, 69 Lab. Cas. 32,783 (S.D. Fla. 1971); Shultz v. Kentucky Baptist Hospital, 62 Lab. Cas, 32,296 (W.D. Ky. 1969); Shultz v. Royal Glades, Inc., 66 Lab. Cas. 32,548 (S.D. Fla. 1971).

Upon the findings and conclusions above made, this case should be dismissed, and

It Is So Ordered.

The Clerk will send a copy of this order and memorandum opinion to all counsel of record.

/s/ Oren R. Lewis
United States District Judge

August 1, 1973

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1994

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellant,

versus

GOLDEN ISLES NURSING HOME, INC.,
d/b/a GOLDEN ISLES CONVALESCENT CENTER,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

(October 31, 1972)

Before PHILLIPS,* THORNBERRY and Roney,
Circuit Judges.

PER CURIAM: This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act, 29 U.S.C.A. Sec. 217 (1970), to enjoin the defendant nursing home's alleged violations of the Act's equal pay provisions. Equal Pay Act of 1963, 29 U.S.C.A. Sec. 206(d)(1) 1970. These alleged violations affect nurse's

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* *Hon. Orie L. Phillips, of the Tenth Circuit, sitting by designation.*

aides and orderlies who were paid unequal wages for the performance of what the Labor Department contends was substantially equal work.

The Secretary had the burden of proving equality of work. *Hodgson v. Brookhaven General Hospital,* 436 F.2d 719 (5th Cir. 1970).

The district court, in special findings of fact, found that the aides and orderlies did not perform substantially equal work and set forth the different functions performed by each. The court held that not only had the plaintiff failed to meet its burden, but the evidence actually supported a contrary conclusion. To prevail on this appeal, the Secretary must show that (1) the district court's findings are clearly erroneous and (2) the evidence compels a finding of fact that the work was equal. F.R. Civ. P., Rule 52 (a).

The findings of the district court are not clearly erroneous, and on that basis we affirm.

A complete analysis of the evidence supporting the findings of fact probably would not be useful. The Secretary would have us ascribe our own weight to the factual differences that appear in the evidence, but weighing and evaluating the facts is properly the task of the trial court. Suffice it to say that the Golden Isles Convalescent Center has a capacity for 200 patients, but it has never cared for more than 105 at one time. The number of patients typically ranges from 78 to 84, most of whom are women. The defendant usually employs 33 or 34 aides and 3 or 4 orderlies, although during one period of several months only one full-time orderly was employed. The Secretary, contending that aides and orderlies perform substantially equal work, seeks to have both groups paid at the same rate.

After noting the many duties performed by both aides and orderlies, the court determined that the following tasks, completed by orderlies, are not done by aides:

> "A. Insertion of catheter, a skilled nursing function, which no aide would perform on males. B. Total lifting. C. Irrigation. D. Setting up a traction. E. Returning patients who had gone out of the building or who had simply wandered off. Acting as drivers to pick up patients. F. Primarily setting up oxygen tanks which required knowledge and skill.
>
> In addition to performing the above different functions, the orderly at Golden Isles was required to 'float' to help in the rest of the nursing home. Aides were not required to 'float.' This was a substantial difference."

The Secretary contends that these duties were performed by aides, that they did not differ greatly from aides' other duties, and that they were performed too infrequently to justify a conclusion that the work was unequal. The evidence, however, does not compel such a finding.

The Department of Labor apparently seeks to obtain a conclusive determination by the courts that, in hospitals and nursing homes across the country, aides and orderlies perform equal work. An *amicus curiae* brief informs us that numerous federal court actions throughout the country involve the "identical" issue raised in this case, i.e., whether nurse's aides perform work "equal" to that of orderlies, within the meaning of the Equal Pay Act of 1963. Some of these cases have been decided in favor of the hospital. *E.g., Hodgson v. Good Shepherd Hospital,* 65 L.C. Sec. 32,500 (E.D. Tex 1971); *Hodgson v.*

William and Mary Nursing Home, 65 L.C. Sec. 32,497 (M.D. Fla. 1971); and *Shultz v. Royal Glades, Inc.*, 66 L.C. Sec. 32,548 (S.D. Fla. 1971). Some have decided that the work of orderlies and aides in the hospitals under consideration was equal. *E.g., Shultz v. Brookhaven Hospital*, 305 F. Supp. 424 (N.D. Tex. 1969); *reversed and remanded sub. nom. Hodgson v. Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970), *on remand*, 65 L.C. Sec. 32,520 (N.D. Tex. 1971); *Hodgson v. George W. Hubbard Hospital*, ___F. Supp.___ [Civ. No. 5334, M.D. Tenn.].

These issues must be decided on a case-by-case basis under the facts of each case. They cannot be decided on an industry-wide basis. All aides in all hospitals do not perform identical functions. Nor do all orderlies in all hospitals perform identical functions. The functions for each classification may not even be substantially equal in different hospitals. The differences or similarities in each case must determine the ultimate outcome under the Equal Pay Act. For example, *Brookhaven* and *Hubbard, supra*, involved different facts than those found at Golden Isles. In *Brookhaven*, where there was a larger number of orderlies than in the case at bar, the court found that both orderlies and aides were assigned equal numbers of patients, that the primary duties of aides and orderlies were the same, and that the secondary and tertiary duties which were thought to distinguish the jobs either did not differ significantly from the primary responsibilities or were performed by aides as well as orderlies. In *Hubbard*, the proof showed that both female nurse's aides and male nurse attendants performed and assisted each other in performing as a unit, without regard to job classification, the task that the employer contended were performed only by the orderlies. Neither *Brookhaven* nor *Hub-*

bard presented the precise configuration of job functions and employee performances found at Golden Isles.

The legislative history of the Equal Pay Act underscores the necessity of case-by-case analysis. By substituting the term "equal work" for "comparable work," which was originally suggested, Congress manifested its intent to narrow the applicability of the Act. Cong. Rec. Vol. 19, Part 7 (88th Congress, 1st Sess.), at 8866, 8892, 8913-8917, 9192-9218, 9761-9762, 9854, and 9941. This legislative history is discussed extensively in *Hodgson v. William and Mary Nursing Home*, 65 L.C. Sec. 32,497 (M.D. Fla. 1971). It is not merely comparable skill and responsibility that Congress sought to address, but a substantial identity of job functions.

Furthermore, Congress intended to permit employers wide discretion in evaluating work for pay purposes. In the House Subcommittee Report on the Equal Pay Act, *109 Cong. Rec. 9209-9210 (1963)*, examples were debated to illustrate that a wage differential can be justified for employees who are available to perform an important differentiating task even though they do not spend large amounts of time at the task. Again, this approach requires examination of equal work claims in the light of practice in the particular employment.

We do not here decide whether the job of orderly should be open to females, or whether the job of nurse's aide should be open to males. Those questions are to be resolved in actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Sec. 2000c (1970), in the manner pursued in *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971). Courts must be cautious not to apply improperly one Congressional act to achieve a purpose for which another act was intended. We here decline, nevertheless, to sanction the concept that only

males can perform the work of an orderly. We decide only that the evidence supports the finding that the work done by the orderly at Golden Isles was sufficiently different from the work done by the aide to justify different pay scales. Having decided that, the extent of the difference is of no concern in this proceeding.

Our affirmance of the district court's finding that the jobs were not substantially equal makes consideration of other government contentions unnecessary.

AFFIRMED.

APPENDIX D

Congressional Debate on Equal Pay Act – House of Representatives, May 23, 1963 – 109 Cong. Rec. Part 7 (88th Cong. 1st Sess.) pages 9194-9218, 9761-9762, 9854 and 9941.

1. Congressman Goodell, Sponsor and a Floor Manager.

"The Chair recognizes the gentleman from New Jersey [Mr. Felinghuysen].
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"MR. FRELINGHUYSEN. Mr. Chairman, I yield myself 6 minutes.

"Mr. Chairman, I rise in support of H.R. 6060. Perhaps, as the gentlewoman from New York has stated, this proposal is too little and too late. Perhaps, as the gentlewoman from Ohio says, this is only the first step in the right direction.

"Mr. Chairman, passage of this bill will mark an important milestone in the campaign for equal rights for women. Its aim is simple, few will argue about the desirability of what it seeks to achieve. Under its provisions, the women of America will be assured of equal pay when they perform equal work. This undeniable right is now to be bolstered and secured by appropriate legislative action.

"As you know, Mr. Chairman, last July, during consideration of this question on the floor of the House, a number of Republican amendments were adopted. Unfortunately, the administration incorporated only a few of these changes when it submitted a new equal pay bill, H.R. 3861, this year. The shortcomings of the administration proposal were numerous, and our committee had some difficulty in working out a satisfactory bill.

"Fortunately, on March 23, the gentleman from New York [Mr. Goodell] introduced H.R. 5605. This bill,

for the first time, placed the administration and enforcement of equal pay legislation under the Fair Labor Standards Act. This concept was the catalyst that had been needed. Very quickly this proposal was accepted by the members of the sub-committee.

* * * * *

"Thus it is apparent that a number of important changes have been made by our committee. As a result, we can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek to insure, where men and women are doing the same job under the same working conditions that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses.

"The inequities which this legislation seeks to correct are apparent to us all. For example, a plant may have one rate for a classification such as male selector and packager and another for the classification female selector and packager. Yet both are doing the same job on the same assembly line. Such discrimination would be a violation. As another example, the classification names may not match—there would be male packagers and female selectors, nonetheless the work the two groups perform is identical in every respect. This, too, would be a violation if the men as a group received more pay than the women. On the other hand, the male packagers may be required to lift the heavy crates off the assembly line and place them on dollies or do various jobs requiring additional physical effort. The women selectors may work on the assembly line, selecting small items, for example, and placing them in crates. This would be a significant difference which would justify a difference in pay."

Page 9197

"MR. THOMPSON of New Jersey. I yield to the gentleman from New York.

"MR. GOODELL. Mr. Chairman, I want to commend the gentleman from New Jersey [Mr. Thompson] as chairman of the subcommittee, for, I think, drastically changing and improving this legislation over what it was last year and over what was proposed earlier this year. His bill now is virtually my bill of March 1963, introduced at a time when no bill in either body of the Congress took the fair labor standards approach to equal-pay-for-women legislation.

"Mr. Chairman, I want to make one major point here: Some of our colleagues are disturbed because they feel that there may be a broad, regulatory power granted to the Secretary of Labor, and I want to make it clear and have the confirmation of the chairman of the subcommittee that there is no general regulatory power granted to the Secretary of Labor under this legislation, that he will have no such power if this legislation in its present form passes the Congress.

"MR. THOMPSON of New Jersey. I agree with the gentleman from New York emphatically."

2. "Equal Work" – Substantially Identical v. "Comparable"

P. 9209

"MR. GOODELL. I think it is important that we have clear legislative history at this point. Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved

should be virtually identical, that is, they would be very much alike or closely related to each other.

"We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are *substantially identical or equal.* I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort and working conditions, is intended to make this point very clear.***

"MR. GOODELL. We are talking about jobs that involve the same quantity, the same size, the same number, where they do the same type of things, with an identity to them.

"MR. GRIFFIN. In addition, it would be clear that in comparing inspectors, if one inspects a complicated part of an engine, for example, while another inspector makes only a cursory type of inspection, obviously, the fact that both are inspectors would not mean that they should necessarily receive equal pay.***

"MR. THOMPSON of New Jersey. Further, in the case of inspectors, someone asked hypothetically yesterday. Suppose they are doing the same work but one of them at the end of the line lifts the parts and carries them away? Obviously, this comes under what we construe to be effort involved. It is an additional matter which clearly obliterates any question that they would be the same.

"MR. GOODELL. Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill:***

"Fourth. Only those jobs that are the same and normally related shall be compared.***

"Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability and training may be considered under the broad heading of skill. The usual factors of push, pull, lift and carry, come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employee's job responsibility.***

"Eleventh. A difference in pay between male selectors and packers and female selectors and packers would be valid if, in addition to the duties performed by the female selectors and packers, the male selectors and packers are required to lift the crates off the assembly line, or sweep up the room, or work on the loading dock during slack periods."

3. Employers Permitted To Evaluate Job Requirements

P. 9198

"MR. GOODELL: It should be understood to be a very broad concept. This could involve a great many factors in terms of personal evaluation of continuous performance on the job, if an employee has demonstrated over a period of time that his performance exhibits more effort in the opinion of the supervisor, then a differentiation in pay will be justified. It also may include such factors as willingness exhibited by the employee and by his actions to expend extra effort and to expend a little extra energy. It should be understood that it is not necessarily that the job requires extra effort, but it may be that an employee expends extra effort so that the performance of the employee on the job justifies a special consideration in terms of his pay.

"* * * It is our intention I believe, on both sides of the aisle to provide here with the use of the terms 'effort,' 'skill,' 'responsibility' and 'working condition,' a maximum area for the interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. In this concept, we want the private enterprise system, employer, and employees and a union, if there is a union, and the employers and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

"MR. GOODELL. We have worked very hard in this debate to set up a legislative history to make it clear what our intention here is.

"*I introduced the first bill that would put this under the Fair Labor Standards Act in either body of Congress,* and the first bill using the terms 'effort,' 'responsibility' and 'working conditions' in defining equal work. Since this bill before us largely adopts my own personal views, and most of the words in this bill derive from my proposal, I would like to make clear the legislative history, and I think the chairman of the subcommittee agrees on these points:

'No. 1. Skill includes a myriad of factors. It is not limited to just a few. It includes training, experience, education, the qualities of the person himself, and a good many factors that are too numerous to put into the bill specifically, so we used a generality in referring to them. The same is true of effort, the same is true of responsibility, and the same is true of similar working conditions.

"No. 2. It is not necessary for an employer to have an elaborate and formal or written job classification system to qualify for exemptions under this bill or to prove that

he is not discriminating on the basis of sex. If he has a reasonable standard of differentiation, the Labor Department is not to come in, even, and judge the reasonableness or unreasonableness of this differentiation among employees, except as it shows a clear pattern of discrimination against sex."

* * * * *

"Mr. Chairman, here are examples and guidelines as to the intent of Congress in enacting H.R. 6060" * * *

"Sixth. Differences in pay that are based upon historical and widely accepted differences in job content will not be challenged, if not based on sex.

"Seventh. Differences in pay that are based upon a bona fide job classification system will not violate this act, if not based on sex.

"Eighth. It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system. It is not the business of the Secretary of Labor to write job evaluations or judge the merits of job evaluation systems. This sole obligation is to uncover and prosecute cases where a pattern of job differentials in pay is permeated by sex discrimination."

5. Subcommittee Report and Red Circle Rates
p. 9210 (Reprinted in Record)

"As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things . . . lifting or moving heavy objects [and] differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is

borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a *premium* rate in order to have them available when they are again needed for their former jobs."

6. Secretary Has No Authority To Issue Regulations pp. 9198 and 9208

"MR. GRIFFIN. That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor even to issue interpretative regulations.

"I emphasize that interpretative regulations are also barred. * * *"

"MR. GRIFFIN. I think it should be pointed out that an earlier version of this legislation did contain a section which would have authorized the Secretary to promulgate regulations. * * * As a result it should be clear from the legislative history that we do not intend to give the Secretary of Labor any broad regulatory powers. * * *"

"MR. GOODELL. I agree with the gentleman. * * *"

"I would like to make specific reference to the report of the other body in reference to regulation, because the other body specifically struck out the power of the Secretary to write regulations, then passed them all over.

"I want to quote it because I think it is inaccurate in the other body's report, and we should repudiate it as a part of our legislative history.

"They say on page 3 of the report:

> The committee recognizes that the application of this new legislation will require a cautious step-by-step implementation in developing the rules, regulations, and *procedures necessary* to a sound administration and enforcement of this Act.

"The implication left there is that the Secretary will have the power to issue rules and regulations, but he would do it on a step-by-step basis. That is entirely wrong, it is an error, and it should be specifically stated.

"Later, at the bottom of the paragraph, they use another improper reference when they say:

> These consultations will take place prior to the issuance of regulations.

"Again implying there will be regulations. *There will not be in the form that the bill passed the Senate, and there will not be in the form that the bill is placed before the House.*"

7. The Secretary Has Burden of Disproving the Exemptions p. 9208

"MR. GOODELL. Having established the prima facie case in the Federal Court, the burden itself will shift to the employer to prove or disprove the allegations of the Secretary of Labor. This is the procedure we have in mind. *The employer does not have to prove the exceptions as an affirmative defense.* The burden remains on the Secretary of Labor to prove that the exceptions do not apply. We do not have in mind the Secretary of Labor's going into an establishment and saying, "Look, you are paying the women here $1.75, and the men $2.10. Come on in here, Mr. Employer, and you can

prove that you are not discriminating on the basis of sex." That would be just the opposite of what we are doing.

"The Labor Department must prove this, and I think the chairman of the subcommittee has amply verified this point in our exchanges thus far."

8. Final Passage in the House
p. 9218

"The bill was ordered to be read a third time, was read the third time, and passed.

A similar House bill (H.R. 6060) was laid on the table.

A motion to reconsider was laid on the table.

The title was amended to read as follows: "To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce."

9. Capitulation in the Senate May 28, 1963
p 9762

"MR. DIRKSEN. Mr. President, if the Senator will yield, I have discussed this question with Senators who normally would have been the conferees on our side had the bill gone to conference. It has also been my privilege and honor to confer with Members of the House who probably would have been the conferees on the minority side. There is a general agreement that the House language is quite preferable to the language contained in the Senate bill. For that reason, I fully subscribe to the motion to concur in the House amendments.

MR. McNAMARA. I thank the minority leader for his cooperation.

THE PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Michigan to concur in the House amendments.

The motion was agreed to."

APPENDIX E

COMPARISON OF ACTIVITIES OF ORDERLIES (30 Sheets) AND AIDES (364 Sheets)

		ORDERLIES		AIDES	
			# Times		# Times
I. OFF FLOOR DUTIES					
Obtain Supplies					
.001 Inhalation Therapy		.200	(6)	.068	(25)
.002 Central Supply		.433	(13)	.373	(136)
.003 Laundry		.233	(7)	.200	(73)
.004 Dietary		.066	(2)	.104	(38)
.005 Purchasing		.066	(2)	.032	(12)
.006 Pharmacy		.300	(9)	.101	(37)
.007 Laboratory		.233	(7)	.118	(43)
.008 Other		.366	(11)	.222	(81)
.113 Return Supplies-CSR, ER		.066	(2)	.093	(34)
.009 Messenger:	X-Ray	.566	(17)	.236	(86)
.010 (Such as	Laboratory	.433	(13)	.392	(143)
.011 Requisitions	Pharmacy	.100	(3)	.126	(46)
.012 & Specimens)	Nursing Off.	.166	(5)	.104	(38)
.013	Purchasing	.166	(5)	.010	(4)
.014	Other	.100	(33)	.381	(139)
		3.494		2.560	
II. TASKS REQUIRING MORE SKILLED AND/OR LESS ROUTINE DUTIES					
.022 Perform Single Task on Another Unit		.900	(27)	.250	(91)
.023 Assist in Emergency Room		.266	(8)	.068	(25)
.024 Assist in Patient Care-Another Unit		.300	(9)	.164	(60)
.025 Assist M.D. with Treatment or Procedure		.633	(19)	.087	(32)
.026 Assist Nurse with Treatment or Procedure		1.100	(33)	.736	(268)
.032 Bath-Complete In Bed		.433	(13)	.315	(115)
.049 Enema-Give		.166	(5)	.167	(61)
.051 Catheter, Insert Foley		.200	(6)	.0	
.052 Catheter, Straight		.033	(1)	.0	
.053 Catheter Care		.166	(5)	.038	(14)
.054 Catheter Irrigation		.0		.200	(16)
.059 Surgical Prep. of Patients		.066	(2)	.057	(21)
.069 Dressing Change		.100	(3)	.082	(30)
.074 Croupette-Setup		.0		.002	(1)
.076 Traction-Obtain Equipment		.033	(1)	.032	(12)
.077 Traction-Set Up Equipment		.033	(1)	.049	(18)
.078 Traction-Remove and/or Clean		.0		.068	(25)
.098 Set Up Equipment (e.g. Suture Tray)		.066	(2)	.068	(25)
.099 Post Mortem Care		.333	(10)	.013	(5)
.120 Fill Croupettes		.533	(16)	.178	(65)
.121 Sterilize Supplies		.0		.071	(26)
.122 Stip Down Delivery Room		.0		.063	(23)
.123 Set Up Delivery Room		.0		.065	(24)
		5.361		2.773	

COMPARISON OF ACTIVITIES OF ORDERLIES (30 Sheets) AND AIDES (364 Sheets) - Continued

III. CLERICAL TASKS	ORDERLIES	# Times	AIDES	# Times
.015 Make Up Charts	.0		.255	(93)
.016 Add Chart Paper to Chart	1.633	(49)	4.120	(1502)
.017 Post Lab Results to Charts	1.433	(43)	1.189	(433)
.018 Answering Telephones 1/	2.733		1.620	
.019 Chart TPR on Graph Sheet	1.433	(43)	5.150	(1873)
.097 Collect Intake & Output Sheet	1.733	(52)	1.085	(395)
.100 Post NPO-Hold Breakfast Signs	.433	(13)	1.428	(520)
.101 Address Pharmacy Slips	.133	(4)	4.800	(1749)
.104 Chart I&O Graph Sheet	.200	(6)	1.192	(434)
.109 Prepare Forms	.033	(1)	.255	(93)
.115 Telephone for Supplies	.0		.032	(12)
	9.764		21.126	

IV. ROUTINE AND MORE SIMPLE TASKS				
.020 Check Clothing and/or Valuables	.066	(12)	.140	(51)
.021 Assist with Visitor Control	.133	(4)	.244	(89)
.027 Receive Report at Beginning of Shift	.900	(27)	.934	(340)
.028 Clarification of Report with Team Leader	.066	(2)	.387	(141)
.029 Giver Report to Team Leader	.500	(15)	1.689	(615)
.030 Attend Report at End of Shift	.033	(1)	.175	(64)
.031 Attend Team Conf/in Service Program	.100	(3)	.079	(21)
.033 Bath, Partial, in Bed	.166	(5)	.381	(130)
.034 Bath, Minor Assistance-Tub, Bed, Shower	.0		.233	(85)
.035 Bath-Attended-Tub, Shower	.033	(1)	.013	(5)
.036 Bath-Sitz (Patient Unattended)	.0		.098	(36)
.037 Bath-Sitz (Attended)	.0		.016	(6)
.038 Make Bed-Patient Not In	1.633	(49)	2.250	(819)
.039 Change Drawsheet (Patient in Bed)	.066	(2)	.494	(180)
.040 Back Rubs	.866	(26)	1.987	(720)
.041 Turn Patient (no skin care)	.266	(8)	.771	(281)
.042 Turn Patient (give skin care)	.033	(1)	.491	(179)
.043 Turn Patient With Assistance	.366	(11)	.640	(233)
.044 Clean Incontinent Patient	1.233	(37)	.895	(376)
.045 Bed Pan-Give and empty	.166	(5)	1.760	(641)
.046 Bed Pan-Give or empty	.166	(5)	.774	(282)
.047 Urinal-Give and empty	.633	(19)	.365	(133)
.048 Urinal-Give or empty	1.266	(38)	.464	(169)
.050 Drainage Container-Empty or replace	.233	(7)	.577	(211)
.055 Obtain Specimen	.533	(16)	.934	(340)
.056 Vital Signs (BP & TPR) 2/	6.860	(206)	7.180	(2614)

.116 Stocked Formula	.0	.082	(39)
.117 Pass Formula to Bassinets	.0	.153	(56)
.118 Take Baby to Breast	.0	.167	(61)
.119 Prepare for Surgery (Check List)	.0	.057	(21)
.120 Diaper Change	.0	.571	(208
	46.856	75.779	

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-542

PRINCE WILLIAM HOSPITAL CORPORATION, PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-15a) is reported at 503 F.2d 282. The opinion of the district court (Pet. App. B, pp. 16a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1974. The petition for a writ of certiorari was filed on November 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that female nurse aides and male orderlies in a hospital were entitled to equal pay under the equal pay provisions of the Fair Labor Standards Act because, despite minor variations in their duties, they performed substantially equal work.

STATEMENT

The Secretary of Labor sued to enjoin petitioner from violating the equal pay provisions of the Fair Labor Standards Act (29 U.S.C. 206(d)) by paying female nurse aides less than male orderlies. Petitioner denied that the aides and orderlies performed equal work, claiming that the orderlies were assigned certain additional duties which required greater skill, effort and responsibility. The district court held that because certain work was required of each group that the other group was neither required nor permitted to do, the work was not "substantially equal," and dismissed the Secretary's suit (Pet. App. B, p. 19a). The court of appeals reversed, noting that the facts were not disputed, and ruling that the district court had given undue weight to the relatively minor differences in described duties (Pet. App. A, p. 2a).

1. Petitioner operates a general hospital. Its aides and floor orderlies are each assigned a certain number of patients. The trial court found that they "[b]oth have the same patient care duties and responsibilities except that the orderlies are usually assigned male patients [and] do not care for infants and children" (Pet. App. B, p. 17a). The time they spend on particular duties may vary between aides and orderlies and among members of each group, depending on their shifts, experience and other factors. These duties encompass a wide variety of supportive services, including, for example, bedmaking, answering calls, bringing and emptying bed pans, feeding patients, taking vital signs, collecting specimens, cleaning incontinent patients, assisting with the admission and discharge of patients, housekeeping, equipment care and supply work.

Other tasks, alleged to differ between the two groups (see Pet. App. A, p. 9a; Pet. 7-11), include performing surgical preps; restraining combative or hysterical patients; obtaining and setting up orthopedic equipment; assisting in the emergency room and other hospital areas; lifting or assisting heavy or helpless patients; and performing catheterizations. Although petitioner contends that the aides almost never performed these duties, Exhibit 26 (prepared by petitioner and reproduced in the petition as Appendix E)[1] shows that aides performed most of these duties with approximately the same degree of frequency as orderlies and that most such tasks were performed infrequently. See n. 1, *supra*, and categories .064-.067; .079-.083; .022-.026.

The only duty which orderlies but not aides performed was male catheterization, and this distinction was made for reasons of modesty (Pet. App. A, p. 13a). This work, however, constituted only a minute part of their total duties. It was done on the average only .233 times a day by orderlies. Moreover, the record indicates that this

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[1]This exhibit was derived from diaries of work performed by three orderlies over 10 working days (30 sheets) and 42 aides over varying numbers of days (364 sheets). The work done was then categorized into 123 categories. See petitioner's brief in the court of appeals, pp. 33-34. The decimal figures under each group are not percentages. They indicate the average number of times per work day the worker performed each task. Thus, work involving traction, items .076-.078, was performed .066 times per day by orderlies (about once in 15 days) and .149 times by aides (about once in seven days). For items .051-.054, involving catheters, the comparable figures are .4 for orderlies and .238 for aides. The total number of tasks performed per day was about 102 for aides and 66 for orderlies. Exhibit 26 does not show the difference in skill, effort and responsiblity required for the several duties. The headings of Groups I through IV were added by petitioner's counsel after the trial and were stricken from Exhibit 26 by order of Judge Lewis (App. A to this brief).

work is a relatively routine task (A. 75; Def's Exh. 11, p. 4; A Guide for Assigning Responsibilities to Nursing Service Personnel, Virginia State Board of Examiners, May 1969).

ARGUMENT

1. The court of appeals correctly ruled — in accord with every other court of appeals that has considered the question — that the work of men and women employees need be only "substantially" equal to be "equal work" under the Act (Pet. App. A, pp. 2a, 15a). *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (C.A. 3), certiorari denied, 398 U.S. 905; *Shultz* v. *American Can Co.—Dixie Products*, 424 F.2d 356 (C.A. 8); *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490 (C.A. 4); *Hodgson* v. *Brookhaven General Hospital*, 436 F.2d 719, opinion after remand, 470 F.2d 729 (C.A. 5); cf. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 203, n. 24.

Petitioner contends, however, that these decisions rest upon a misinterpretation of the legislative history of the equal pay provisions of the Fair Labor Standards Act and that that history shows that Congress, when it required equal pay for "equal work," intended the word "equal" to mean "substantially identical" (Pet. 2, 17, 25). To the contrary, we submit that those courts properly interpreted the legislative history as reflecting an intention to provide equal pay for men and women as long as their work was "substantially" equal.

Congress intended the Act's equal pay provisions to apply where men and women are employed in the same or closely related jobs and do "substantially the same work" (Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, on Equal Pay Act, H.R. 3861 and Related Bills, 88th Cong., 1st Sess., p. 240). Thus, Senator McNamara, Chairman of the Senate Labor Subcommittee and sponsor of the

Senate bill, noted that part of the House discussion would support the interpretation that only "identical" jobs were covered. He then stated: "[It] is most important that the Senate intent be made clear as to language in the bill which is the same in both the Senate and House versions," since "[t]he discussion that surrounded the congressional consideration of this bill has somewhat clouded the question of the definition of 'equal skills, efforts, and responsibilities'" (109 Cong. Rec. 9761). He stated that the Senate Report "makes it clear that it is not the intent of the Senate that jobs must be identical. * * * Based on some of the discussion which has taken place, these jobs [which involve equal skills, efforts and responsibilities] would not be considered equal because they are not identical, and such a conclusion would be obviously ridiculous" (*ibid.*).

Petitioner argues (Pet. 18-23) that this explanation by one of the bill's sponsors, together with the entire Senate debate, must be disregarded since the Senate bill was "scrapped" for "a completely different House-passed version" (Pet. 18-19). This is incorrect. S. 1409, the bill which passed the Senate, and H.R. 6060, whose text was substituted for it by the House,[2] are almost identical. The only differences between the two bills (set forth in full at 109 Cong. Rec. 9217-9218) are on matters irrelevant to the issues in this case.[3] In accepting the House version, the Senate was not "capitulating" in any sense of the word, as petitioner suggests (Pet. 19, 21), but simply agreeing to it.

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[2]Petitioner is in error when it states that Senator McNamara "sponsored S. 4609" (Pet. 21). His bill was S. 1409, as indicated in the text.

[3]Section 3 of the House substitute added language forbidding union attempts to cause an employer to violate the Act. It also stated that pay differentials caused by a merit, seniority, or piecework system did not violate the Act. The Senate bill contained only a section, retained in the House version, permitting any differential "based on any factor * * * other than sex."

2. The court of appeals correctly held that, despite some minor variations in the work performed by female nurse aides and male orderlies in petitioner's hospital, their work was substantially equal. The district court found that the aides and orderlies "have the same patient care duties and responsibilities except that the orderlies are usually assigned male patients" (Pet. App. B, p. 17a), and the court of appeals ruled that the minor variations between the work done by the two categories "do not affect the substantial equality of their overall work" (Pet. App. A, p. 15a).

The fact that the orderlies are usually assigned to male patients and do not care for infants and children does not undermine the conclusion that they perform substantially the same work as the female nurse aides. The critical focus is upon the work which they perfom and not upon the persons for whom they perform it. The orderlies and the nurse aides perform substantially the same work, even though the former perform it mainly for male patients.

Contrary to petitioner's contention (Pet. 13-16), the decision below does not conflict with *Hodgson* v. *Golden Isles Nursing Convalescent Homes, Inc.*, 468 F.2d 1256 (C.A. 5), on the issue whether female aides and male orderlies perform equal work. In the *Golden Isles* case, the court held that male orderlies at a geriatric nursing home did not perform work substantially identical to that of the female aides, based on the facts of the particular case, "primarily" that the male orderlies were required to transport heavy oxygen tanks, which the female aides could not do. See Pet. App. C, p. 23a; Pet. App. A, p. 10a, n. 7. The different results in the present case and *Golden Isles* reflect the differences between the work performed by the female and male attend-

ants in the two cases. Indeed, the Fifth Circuit in its subsequent decision in *Hodgson* v. *Brookhaven General Hospital*, 470 F.2d 729, in holding that female hospital aides and male orderlies performed equal work, distinguished its earlier *Golden Isles* decision on that factual ground. There is thus no conflict among the circuits on the proposition that, where the female and male hospital attendants perform substantially equal work, they are entitled to equal pay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

WILLIAM J. KILBERG,
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Department of Labor.

FEBRUARY 1975.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JAMES D. HODGSON,
Secretary of Labor, etc.,

Plaintiff

CIVIL ACTION NO. 10-72-A

vs.

USCA No. 73-2331

PRINCE WILLIAM HOSPITAL
CORPORATION,

Defendant

AMENDED ORDER PURSUANT TO RULE 10(e) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

This case having been reached for trial on July 25, 1972, at the conclusion of which the Court requested briefs and additional exhibits or charts comparing, on the basis of evidence received at trial, the duties and responsibilites of the female nurse aides and male orderlies, and the Court having entered on December 20, 1973, at defendant's request made pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, an order permitting certain post-trial exhibits tendered by the defendant to be made a part of the record, and the plaintiff having objected to the entry of said order on the ground, among others, that certain of defendant's post-trial exhibits were based on information outside the record, NOW, THEREFORE, upon the joint motion of plaintiff and defendant, the Court hereby amends its order of December 20, 1973, in the following respects:

(1) By striking from the record defendant's post-trial Exhibits 23 and 24.

(2) By admitting as part of the record defendant's charts, denominated Exhibits 26 through 29, on the condition that all footnotes and headings characterizing the degree of skill required in the performance of the enumerated duties be stricken, and

(3) By admitting as part of the record plaintiff's chart, denominated as Appendix A to his post-trial brief.

This order is entered pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, the case now being on appeal to the United States Court of Appeals for the Fourth Circuit, on this the 22nd day of March, 1974.

(signed) Oren R. Lewis
United States District Judge

Seen and approved:

(signed) Carin Ann Clauss
Carin Ann Clauss
Associate Solicitor
U.S. Department of Labor

B. P. Gettings
United States Attorney

By
By (signed) David H. Hopkins

(signed) John K. Pickens
John K. Pickens
Attorney for Prince William Hospital

A True Copy, Teste:
W. Farley Power, Jr., Clerk

By (signed) Betty McFadden
Deputy Clerk